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2500
No. 11758

United States
Circuit Court of Appeals
For the Ninth Circuit

ESTATE OF JOSEPH H. HEIDT, Deceased;
LOUISE SEELEY, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.


Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

APR 23 1948

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

CLAUDE I. PARKER, ESQ.,
RALPH W. SMITH, ESQ.,
JOHN MOORE ROBINSON, ESQ.,

For Commissioner:

H. A. MELVILLE, ESQ.,

Tax Court of the United States

Docket No. 5802

ESTATE OF JOSEPH H. HEIDT, deceased,
LOUISE SEELEY, executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transferred to Judge Harlan 12/4/46

DOCKET ENTRIES

1944

Aug. 14—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 15—Copy of petition served on General Counsel.

Sept. 21—Answer filed by General Counsel.

Sept. 21—Request for Circuit hearing in Los Angeles, Calif., filed by General Counsel.

Sept. 26—Notice issued placing proceeding on Los Angeles calendar. Service of answer and request made.

1945

Sept. 6—Motion to place proceeding on the Reserve calendar, filed by General Counsel.
9/11/45 Granted to Reserve A.

1946

Jan. 30—Motion to restore to the Los Angeles, Calif. calendar, filed by General Counsel. 2/1/46 Granted.

Apr. 16—Hearing set June 10, 1946 in Los Angeles, California.

June 21—Hearing had before Judge Black on merits. Appearance of R. W. Smith, and J. M. Robinson as counsel, filed. Petitioner's brief 8/5/46. Respondent's brief 9/5/46 and Petitioner's reply brief 10/5/46.

July 8—Transcript of hearing 6/21/46 filed.

Aug. 5—Motion for extension to 9/1/46 for petitioner's opening brief and to Oct. 1, 1946 for respondent's brief filed by taxpayer. 8/5/46 Granted.

Sept. 9—Motion for leave to file the attached brief, brief lodged, filed by petitioner. Granted. 9/10/46 Copy served.

Oct. 8—Brief filed by General Counsel. Copy served.

1947

May 6—Findings of fact and opinion rendered, Judge Harlan. Decision will be entered for the respondent. Copy served.

May 6—Decision entered. Judge Harlan. Div. 11.

1947

Aug. 4—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by petitioner.

Aug. 4—Proof of service filed.

Aug. 29—Certified copy of order from U. S. Circuit Court of Appeals, 9th Circuit, enlarging time to sixty days from 9/13/47 for transmission of record filed.

Sept. 24—Designation of contents of record filed by petitioner, with acknowledgement of service thereon.

Sept. 24—Statement of points to be relied upon and designation of parts of record to be printed, filed by petitioner, with acknowledgment of service thereon. [2*]

[Title of Tax Court and Cause.]

PETITION

The above named Petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:ET:90D:NAB, dated May 19, 1944, and as a basis of this proceeding alleges as follows:

1. Petitioner, Louise Seeley, is the duly appointed, qualified and acting executrix of the Estate of Joseph H. Heidt, deceased.

*Page numbers appearing at top of page of Reporter's Certified Transcript of Record.

2. The notice of deficiency, copy of which is attached hereto and marked "Exhibit A," was mailed to the Petitioner on or about May 19, 1944.

3. The tax in controversy is estate tax in the total amount of \$16,435.01.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors: [3]

Respondent has overstated the net estate for basic tax and for additional tax to the extent of \$76,-942.35 in that he has included the entire value of Items 1 to 8 inclusive, shown in his notice of deficiency under the heading "Explanation of Changes," whereas he should have included not in excess of one-fourth the entire value of all of said items, with the exception of Item 5, as to which Item he should not have included any portion of the value.

5. The facts upon which the Petitioner relies as a basis of this proceeding are as follows:

(a) For a period of about thirty-five years prior to the decease of Joseph H. Heidt, Louise Heidt Seeley, (formerly Louise Heidt) was engaged in the business of an interior decorator, having contacts with all the leading department stores in the city of Los Angeles, from which business she realized substantial earnings.

(b) Louise Heidt Seeley inherited some property from her father's estate during or about the year 1891. By reason of her ownership of the property so inherited, she acquired other properties which she disposed of and with the proceeds realized from this source, plus the

profits arising from her activities as an interior decorator, she accumulated substantial separate funds which were used in the purchase of the properties held by her husband and herself as joint tenants at the time of the husband's decease on November 22, 1942.

(c) The properties, both real and personal, set forth in the Respondent's notice of deficiency, (Exhibit "A"), excepting Lot 24 of Sunset Park Tract in the city of Los Angeles, listed as Item 3 in the deficiency notice, and excepting the promissory note secured by a trust deed listed as Item 5 in the Respondent's notice of deficiency, were acquired by the decedent and his wife subsequent to January 1, 1928, and the full considerations paid therefor, or from which said properties resulted, consisted of the separate estate of the wife and of the community property of herself and Joseph H. Heidt.

(d) Lot 24 of said Sunset Park Tract, mentioned in the preceding paragraph, was acquired by decedent and his then wife during the month of December, 1920, as joint tenants, and more than one-half the cost thereof was contributed by Louise Heidt from her own separate property.

(e) The property securing the promissory note listed as Item 5 in the deficiency notice, was acquired during the month of October, 1906, by Louise Heidt as her sole and separate property and so remained until it was sold,

and a trust deed was taken in the name of said Joseph H. Heidt and Louise Heidt as joint tenants.

(f) More than three-fourths of the total consideration and contribution paid for the properties itemized in the attached Exhibit "A", with the exception of the two properties specifically mentioned above, originally belonged to the surviving joint tenant, Louise Heidt Seeley, having originated from her separate estate and her separate earnings from the interior decorating business.

Wherefore, Petitioner prays that this Court may hear this petition and determine, (1), that at least three-fourths of the entire consideration with which the properties listed in Exhibit "A" were acquired, except as to property listed as Item 5, originally belonged to Louise Heidt Seeley, the surviving joint tenant, and as to property listed as Item 5, determine that all the consideration paid for said property, originally belonged to Louise Heidt Seeley, and (2) that by reason of said ownership, find the Respondent erred in his determination of deficiency estate tax liability.

CLAUDE I. PARKER,
RALPH W. SMITH,
Counsel for Petitioner.

Of Counsel:

L. A. LUCE,
937 Munsey Building,
Washington, D. C.

State of California,

County of Los Angeles—ss.

Louise Heidt Seeley, of the City of Los Angeles, State and County aforesaid, being duly sworn deposes and says that she is the duly appointed, qualified and acting executrix of the estate of Joseph H. Heidt, deceased, and is the Petitioner in the foregoing Petition; that she is familiar with the facts stated therein and that the facts so stated are true and correct, except such facts as are stated upon information and belief, and those facts she believes to be true.

/s/ LOUISE HELDT SEELEY.
Petitioner.

Subscribed and sworn to before me this 9th day of August, 1944.

[Seal] /s/ DAVID D. SALLEE,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

[Letterhead Treasury Department]

Office of Internal Revenue Agent In Charge Los
Angeles Division. LA:ET:90D:NAB May 19.
1944.

Estate of Joseph H. Heidt, Deceased
Mrs. Louise Seeley, Executrix
745 South Dunsmuir Avenue
Los Angeles, California

Dear Mrs. Seeley:

You are advised that the determination of the estate tax liability of the above named estate discloses a deficiency of \$16,435.01, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent In Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the

closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent In
Charge.

Enclosures:

Statement

Form of waiver [8]

LA:ET:90D:NAB. District of Sixth California.

Estate of Joseph H. Heidt. Date of death:
November 22, 1942

STATEMENT

	Liability	Assessed	Deficiency
Estate Tax	\$16,852.06	\$417.05	\$16,435.01

In making this determination of the Federal estate tax liability of the above named estate, careful consideration has been given to the report of examination dated January 10, 1944.

ADJUSTMENTS TO NET ESTATE

Net estate for basic tax as disclosed by return.....	\$(31,184.99)	
Additions to value of net estate and decreases in deductions:		
Jointly owned property	\$76,942.35	
Miscellaneous administration expenses	500.00	77,442.35
Net estate for basic tax as adjusted.....		\$ 46,257.36
Net estate for additional tax as adjusted		\$ 86,257.36

EXPLANATION OF CHANGES

Jointly owned property	Returned	Determined
Item 1	\$15,000.00	\$ 30,000.00
Item 2	27,500.00	55,000.00
Item 3	9,000.00	18,000.00
Forwarded	\$51,500.00	\$103,000.00
Brought forward	Returned \$51,500.00	Determined \$103,000.00
Item 4	5,500.00	11,000.00
Item 5	0.00	7,262.05
Item 6	10,975.58	21,951.37
Item 7	704.51	1,409.02
Item 8	1,000.00	2,000.00
Total	\$69,680.09	\$146,622.44
Difference		\$ 76,942.35

The whole value of each of the above-described items are included in the gross estate under the provisions of Section 811(e) of the Internal Revenue Code as amended by Section 402(b) of the Revenue Act of 1942.

Miscellaneous administration expenses

Item (A)	\$ 250.00	\$ 0.00
Item (B)	250.00	0.00
Difference		500.00

Item (A) is disallowed, inasmuch as legal services in connection with the termination of joint tenancy are not properly deductible under the provisions of section 81.32 of Regulations 105.

Item (B) is disallowed, as it has not been shown whether this fee has been or will be paid.

COMPUTATION OF ESTATE TAX

	Returned	Determined
Gross estate for basic tax..	\$ 69,680.09	\$146,622.44
Deductions	100,865.08	100,365.08
Net estate for basic tax.....	\$ 31,184.99	\$ 46,257.36
Net estate for additional tax	\$ 8,815.01	\$ 86,257.36
Gross basic tax		\$ 462.57
Credit for estate and inheritance tax		0.00
Net basic tax		\$ 462.57
Total gross taxes (basic and additional)		\$ 16,852.06
Gross basic tax		462.57
Net additional tax		16,389.49
Total net basic and additional taxes.....		\$16,852.06
Total tax payable		\$16,852.06
Estate tax assessed:		
Original, list August 1943; P. 103, L. 6.....		417.05
Deficiency		\$16,435.01

Upon receipt of a waiver, or upon the expiration of 90 days from the date of this letter, if a petition is not filed with The Tax Court of the United States, \$16,064.95 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by section 81.9 of Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the credit evidence may be expected.

Filed August 14, 1944. [12]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

- 1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.
3. Admits that the tax in controversy is estate tax; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.
5. Denies the allegations contained in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition.
6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied. [13]

Wherefore, it is prayed that the determination of the Commssioner be approved.

/s/ J. P. WENCHEL, ECC,
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

EARL C. CROUTER,

B. M. COON,
Special Attorneys,
Bureau of Internal Revenue.

BMC/mm/9/9/44.

Received and filed Sept. 21, 1944.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Promulgated May 6, 1947

Decedent and his spouse, residing in a community property state, held property as joint tenants at the time of the decedent's death. The entire value of such joint property is includable in the gross estate of the decedent, except such proportion thereof as may be shown to have originally belonged to the surviving spouse or acquired by the surviving spouse for a full and adequate consideration in money or money's worth.

Where a portion of the consideration for such jointly held property was furnished by the surviving spouse from funds in which her personal earnings and separate property have been comingled with community property and there is no evidence as to what portion of the consideration furnished represented compensation for personal services of her separate property, no proportion has been shown to have originally belonged to the surviving spouse or to have been acquired by her for a full and adequate consideration in money or money's worth within the intendment of the statute.

Ralph W. Smith, Esq., and John Moore Robinson, Esq., for the petitioner.

H. A. Melville, Esq., for the respondent. [15]

This case involves a deficiency in Federal estate tax determined by the respondent in the amount of \$16,435.01. The case was submitted on documentary evidence and oral testimony.

The question presented is whether decedent's wife, as surviving joint tenant with decedent, in a community property state, made any contributions to the property jointly owned at the time of decedent's death, which contributions should be excluded from the gross estate of the decedent under Section 811 of the Internal Revenue Code as amended by the Revenue Act of 1942.

Findings of Fact

The petitioner, Louise Seeley (formerly Louise Heidt), is the duly appointed and qualified executrix of the estate of Joseph H. Heidt, who died November 22, 1942, at the age of 99 years and 11 days. At the time of his death the decedent was a resident of North Ridge, California. The Federal estate tax return, form 706, was filed June 14, 1943, with the collector of internal revenue for the sixth district of California by his widow, who had remarried and was then Mrs. Louise Seeley, as surviving joint tenant.

The decedent, Joseph H. Heidt, and Louise Weise were married in 1893, at which time he was about 50 years of age and she was 18 years of age. At all times subsequent to their marriage they resided in the State of California until the decedent's death.

At the time of their marriage the decedent owned no real estate or personal property, other than his personal effects, and after his marriage he did not acquire any property by gift, devise or inheritance except about \$1,000 which his wife gave him to start in business.

The decedent, with the \$1,000 given him by his wife, started in the business of dealer in produce. He started in a store at the Angel's Flight and then opened a small stall in Central Street Market. He specialized in potatoes [16] and onions and became known as the "Potato King." He leased ground to plant potatoes and onions in California and Idaho. His business was successful and he made a great deal of money, but due to market fluctuations he went broke three times during his business career, but never went into bankruptcy. His business was speculative and he sometimes bought property and had the title put in the joint names of himself and his wife. Their bank accounts were also kept in their joint names. On several occasions he told his wife that if anything happened to him he wanted everything to go to her. It was also understood that if anything happened to her everything would go to him. Decedent continued in business until 1934 when he retired at the age of 91.

During their entire married life decedent supported his wife and paid all of their living expenses from his earnings.

The decedent was never engaged in the real estate business.

Shortly after her marriage decedent's wife engaged in the real estate business and was very successful. She bought and sold real estate, built houses and apartment houses and hotels and furnished, managed and operated them. A part of the time she had a real estate license, but most of the time she did not. She had about \$1,500 when

she was married. A part of this, approximately \$1,000, she gave to her husband to start in the marketing business. About two months after her marriage her parents gave her, as a wedding present, a deed to a house and lot in Colton, California. This Colton house was traded for a store at Angel's Flight on South Broadway, Los Angeles. This property was sold and with a part of the proceeds she bought a lot in Boyles Heights upon which she built a four room cottage. In the construction of the cottage she received a gift from her father of \$400 and \$800 from her mother. She subsequently sold the Boyles Heights property and bought a house on Washington Street. This property was sold and petitioner bought a place on Ruth Avenue, on which was [17] located an old house. She moved the house and built Boyle Apartments. She furnished the apartment house (12 apartments) and operated it for about four years, then sold the furniture and leased the building. Decedent's wife continued her real estate operations during her marriage with decedent.

At the death of the decedent there were 8 items of property held jointly by the decedent and his surviving spouse. These 8 items were reported under Schedule E of the estate tax return and, with the exception of item 5 (which was excluded with the notation that "Decedent furnished nothing towards the acquisition of this item"), were included in the gross estate at one-half their value, decedent claiming one-half interest therein. The following facts concerning these items appear in the record.

One

This property, known as North Ridge Ranch, was bought by the decedent for approximately \$28,000 and held in joint tenancy by decedent. The down payment on the property was made with money which he borrowed from a friend. Decedent's wife then sold property, which she had acquired in Palm Springs, for \$9,000 and gave the money to the decedent to pay back the borrowed purchase money. The Palm Springs property which stood in her name originally consisted of a house and two lots which cost about \$4,500. Decedent's wife bought it with cash accumulated from different properties which had been sold and built two houses on the lots. The North Ridge Property was sold after decedent's death for \$30,000.

Two

This property, held in joint tenancy by decedent and his wife, consisted of two apartment houses located at Dunsmere and Eighth Streets in Los Angeles, California. It was acquired by the decedent for cash (derived from profits from different trades made by the decedent and his wife) about 10 or 12 years before the decedent died. It was sold after decedent's death for \$55,000. [18]

Three

This property, held in joint tenancy by decedent and his wife, consisted of two houses, one five-room and the other four room, on Sunset Place (or Sunset Park) acquired about 15 years before de-

cedent's death. The decedent paid \$12,000 to \$14,000 for one property and decedent's wife paid about \$15,000 for the other with money acquired by working and accumulated from real estate transactions. The Property was sold after the decedent's death for \$18,000.

Four

This property, which was used by the decedent and his wife as a home for a time, is located on El Camino in Beverly Hills. It was acquired by the decedent who took a mortgage on the property as security for a loan. The property was held by decedent and his wife as joint tenants.

Five

This property was located on Ruth Avenue and known as the Elmo Hotel. It was built by decedent, and first rented, then sold, by the decedent to a Japanese who gave a joint promissory note to decedent and his wife secured by a deed of trust. Decedent's widow did not know the number of rooms or what its cost was.

Six

The property involved in this item consisted of a joint bank account in The Bank of America in the amount of \$21,951.37, some of which was deposited by decedent and some by his wife. At the time of decedent's death approximately \$10,000 of the amount in the joint account had been deposited by decedent's wife. The money so deposited came

from rents from different buildings and apartments. Decedent's wife deposited all the funds from the business transactions which she made in this joint account. [19]

Seven

The property involved in this item was \$1,409.02 deposited in the California Bank, 9941 Wilshire Boulevard, Beverly Hills, to the joint account of decedent and his wife. The money was deposited by the decedent and came from the sale of different properties which had been accumulated.

Eight

The property involved in this item consisted of 20 United States defense bonds of a par value of \$2,000 which had been purchased by the decedent with his own funds. They were put in the joint names of the decedent and his wife.

In computing the deficiency here in question the respondent included in the gross estate the full value of all eight items of jointly owned property set out above.

In addition to the jointly owned property which was reported in the estate tax return, the surviving spouse (decedent's wife) owned considerable property, both real and personal, which stood in her own name and was not included in the estate tax return.

Opinion

Harlan, Judge: The respondent contends that the petitioner has failed to prove that any amount was contributed by the surviving spouse to the 8 items of jointly held property set out in our findings of fact and, therefore, having failed to meet her statutory burden of proof, the entire [20] value of such properties at the time of decedent's death must be included in the gross estate under section 811 (e) of the Internal Revenue Code, as amended, by section 402 of the Revenue Act of 1942.¹

¹Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * * *

(e) Joint and Community Interests.

(1) Joint interest—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate

The petitioner contends that the surviving spouse contributed to the acquisition of the jointly held properties certain funds that were acquired as the result of her personal services and the investment and reinvestment of her separate property. She especially contends that the surviving spouse furnished all the consideration for Item 1, the North Ridge Ranch and Item 5, the joint note from the Japanese, and, therefore, the value of these items

and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy, by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) Community interests—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

should be excluded from the gross estate of the decedent in their entirety. As to the remaining items in dispute the petitioner contends they were acquired either from the separate property of the surviving spouse or from the community property derived or acquired through the personal efforts of the surviving spouse and, therefore, at least one-half thereof should be excluded from the gross estate since not to exceed one-half was subject to the testamentary disposition of the decedent.

The merit of these contentions cannot be accurately appraised without some inquiry as to the nature of the consideration furnished by either spouse for their respective interests in the jointly held property.

The question resolves itself into one of fact and the evidence before us is, in the most part, very unsatisfactory. This situation is due primarily to the fact that the principal witness was somewhat advanced in years and the transactions involved covered a period of almost fifty years, a situation that would tax the memory of any witness. In our findings we have included the facts that appear from the record as a whole. Apparent inconsistent statements have been resolved in the light of the whole record and all the surrounding circumstances.

In determining whether the petitioner has met her burden of proof we must keep in mind the requirements of the statute under which the question here [22] arises. Section 811 (e) (1), I. R. C., as amended by the 1942 Act, requires that there shall

be included in the gross estate for estate tax purposes the entire value of property held by the decedent and any other person as joint tenants, except such part thereof "as may be shown" to have originally belonged to such other person or acquired from the decedent for an adequate and full consideration in money or money's worth.

In 1942 Congress adopted the amendment to Section 811 of the Internal Revenue Code, section 811 (e) (2), designed to eliminate what was believed to be an unequal distribution of the tax burdens of estate taxes and to apply to community property the principles of estate taxes which had already been applied to other forms of joint ownership on the death of either of the joint owners. See *Fernandez vs. Weiner*, 326 U. S. 340, 350. The amendment included in the gross estate all of the interest held as community property by decedent and the surviving spouse, "except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse." Obviously, under the amendment property "excepted" as compensation for personal services actually rendered, or acquired by such compensation is treated as having been received or acquired for "an adequate and full consideration in money or money's worth," as used in Section 811 (e) (1), applicable to joint tenancies.

The decedent and his wife were married in California and resided there until his death. Under the laws of that state, sections 162 and 163 Civil Code of California, 1941 Edition, all property of either spouse owned before marriage and that acquired thereafter by gift, bequest, devise or descent, with [23] the rents, issues and profits thereof, is his or her separate property and all other property acquired after marriage by either spouse while domiciled in the state is community property with certain limitations not material here, section 164, C. C. C. Under the laws of that state, section 161 C. C. C., a husband and wife may also hold property as joint tenants, and such property may consist of community property transferred to themselves when expressly declared in the transfer to be a joint tenancy.

It is obvious, therefore, that where a husband and wife, in the state of California, acquire property as joint tenants the consideration paid therefor may consist of community property (which may include compensation for personal services), the separate property of either or both spouses, or part community property and part separate property.

The applicable regulations are: Regulation 105, Section 81.22 as amended by T. D. 5239 C. B. 1943, p. 1085, but Cf. the rule previously applicable as briefly stated in *Estate of Paul M. Vandenhoeck*, 4 T. C. 125. Section 81.22, as amended, of the above Regulations provides in part, as follows:

For the purpose of determining the taxable portion in accordance with the above rules in the gross estate of decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of decedent's death is includable in his gross estate with the exception stated in the preceding sentence. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23. [24]

The purpose of the foregoing amendment to Section 81.22 of Regulation 105 was to bring it in harmony with Section 81.23 relating to the inclusion in decedent's estate of community property owned at the time of his death as provided in Section 911

(e) (2), I. R. C., enacted in the Revenue Act of 1942. The regulation above set out is thus attempting to correlate the rules governing property held jointly or by the entirety with the "Federal Tax Law" of community ownership. For example, if community property is attributable solely to the earnings or separate property of the husband, who predeceases his spouse the entire property is now includable in his gross estate. The regulations add that if the spouses transform their community ownership into a joint tenancy, the entire property is also taxed as part of the husband's estate.

In other words, the wife's former interest in the community property is not regarded as property originally belonging to her. Decedent died November 22, 1942. Therefore Section 81.22, Regulation 105 as amended, quoted above is applicable to this proceeding. So far as we can see it is a reasonable regulation and we shall therefore endeavor to apply it to the facts as detailed in our findings of fact. It is obviously necessary that the taxpayer identify the proportion of joint property which he seeks to exclude from the [25] gross estate as derived originally from "compensation for personal services actually performed" or from "separate property" if the intendment of the statute is to be carried out.

It is, therefore, incumbent on petitioner to show that the portion of the consideration furnished by the surviving spouse for the joint property which she seeks to exclude from decedent's gross estate was derived from compensation for personal serv-

ices actually rendered by the surviving spouse or from her separate property in order to bring the claimed exclusion within the statute.

The record shows that the decedent owned no property at the time of his marriage, and that he acquired no property thereafter by gift, devise or inheritance. It is presumed, therefore, that all of the property he acquired during marriage was community property. The decedent's wife on the other hand had about \$1,500 when she was married and received thereafter, as a wedding present from her parents, the house in Colton, and, somewhat later, gifts aggregating \$1,200. This was her separate property. Of the \$1,500, \$1,000 was advanced to her husband, the decedent, to start in business, and the balance of her separate property was used for household decorations and to acquire real estate. Thereafter by trading, buying, building and renting real property and by investing accumulated profits decedent's wife acquired considerable property, some of which was carried in her own name and some of which was in the joint names of herself and the decedent, but all of it so commingled that it is impossible from the evidence to trace either her separate property or that acquired by personal services. [26]

It is true that as to items 1, 3 and 6, we have found that decedent's wife made contributions in the respective amounts of \$9,000, \$15,000 and \$10,000. It may be that if we were concerned only with a joint tenancy in a non-community property state the evidence before us would be sufficient to meet petitioner's burden of proof as to these items. Cf.

Richardson vs. Helvering, 80 Fed. (2d) 548, and see Berkowitz vs. Commissioner, 108 Fed. (2d) 319. In the latter case the Court held that it was the ownership of profits that was the controlling question and that there was an agreement to share profits. In the instant case the profits from the efforts of both decedent and his wife were the community property of both. Only a portion of it, i. e., the part that is shown to be derived from personal services actually rendered, is to be considered to represent "money or money's worth" within the meaning of section 811 (e) (1).

As to item 1, the record shows that the \$9,000 which the surviving spouse contributed to the purchase of the North Ridge Ranch was the price received for the Palm Springs property. But the Palm Springs property had been bought with cash accumulated from profits from the sale of different properties, some of which had apparently been held by the decedent and some by the surviving spouse. There is no evidence that any part of such consideration was derived from compensation for personal services actually rendered by the surviving spouse or from her separate property. The same situation existed as to item 3, except it appears that some part of the purchase price represented personal services. The surviving spouse testified that the money was accumulated from real estate transactions "and I worked." But there is no evidence as to what part of the \$15,000 which she paid for one of the properties represented [27] compensation

for personal services and what part represented accumulations from real estate transactions. Item 6 was a joint bank account in the amount of \$21,-951.37. The surviving spouse testified that she had approximately \$10,000 of her own funds deposited in this account. But here against there is no evidence that any part of such funds represented compensation for personal services actually rendered or the separate property of the surviving spouse. The surviving spouse testified that it came from rents and represented accumulated profits from business transactions which would be community property includible in the gross estate, *Fernandez vs. Wiener*, *supra*, unless shown to come within the statutory exception. As to items 1, 3 and 6, petitioner has not shown that she is entitled to the exception claimed under section 811 (e) (1) of the Internal Revenue Code. To allow an exception from the gross estate under section 811 (e) (1) of community property includible therein under 811 (e) (2) would open up a field of tax evasion which, in our judgment, would defeat the very purpose of section 811 (e) (2).

As to Items 2, 4, 5, 7 and 8 the petitioner has not clearly shown that the surviving spouse furnished any of the consideration for the property involved. Certainly there is no direct evidence that it was purchased, either in whole or in part by her separate property or her personal earnings. Much of the evidence is vague and uncertain but there is evidence that all of these items were purchased or acquired

by the decedent and put in the joint names of himself and wife in order that the property would, upon the death of either, go to the survivor.

It is true that decedent's wife performed services in connection with the transactions in real estate which she carried on and that she invested, shortly after her marriage, separate property of the approximate value of \$1,200, but it is also true that at the time of the decedent's death she owned and carried in her name considerable property, both real and personal, which was [28] not included in the estate tax return. Whether or not this property represented her personal services or the original investment of her separate property does not appear. There is, however, no evidence in the record that she received any property by gift, devise or descent after the house and \$1,200 given her by her parents about the time of her marriage, as set out in our findings above, and there is no evidence of the value of the property which she held in her name at the time of decedent's death.

Upon the whole record we find that the petitioner has failed to show that any part of the value of the eight items of jointly held property in question should be excluded from the gross estate of the decedent on account of consideration furnished by the surviving spouse. The determination of the respondent is therefore approved.

Reviewed by the Court.

Decision will be entered for the respondent.

[Seal] [29]

Murdock, J., dissenting: A portion of the value of items one, three, and six should be excluded from the decedent's gross estate because the findings show that parts of those jointly held properties originally belonged to the surviving spouse as a result of her personal efforts and had not been received or acquired by her from the decedent. There has been no failure of proof as to those parts and an allocation could easily be made. Cf. *Cohen vs. Commissioner*, 39 Fed. (2d) 540.

Van Fossan and Leech, JJ., agree with this dissent.

[Seal] [30]

The Tax Court of the United States

Docket No. 5802

ESTATE OF JOSEPH H. HEIDT, Deceased,
LOUISE SEELEY, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 6, 1947, it is

Ordered and Decided: That there is a deficiency in estate tax of \$16,435.01.

/s/ BRYON B. HARLAN,
Judge.

[Seal]

Entered May 6, 1947. [31]

Before the Tax Court of the United States

Docket No. 5802

In the Matter of ESTATE OF JOSEPH H.
HEIDT, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Room 229, United States Post Office, Spring, Tem-
ple and Main Streets, Los Angeles, California,
June 21, 1946, 11:00 A.M.

Before: Honorable Eugene Black, Judge.

Appearances:

John Moore Robinson, Esq., 650 South Spring
Street, Los Angeles, California, and Ralph W.
Smith, Esq., and Oliver O. Clark, Esq., 403 West
Eighth Street, Los Angeles, California, appearing
on behalf of Estate of Joseph H. Heidt, Deceased,
Petitioner.

H. A. Melville, Esq., (Honorable J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue), ap-
pearing on behalf of the Commissioner of Internal
Revenue, Respondent.

PROCEEDINGS

The Clerk: 5802, Estate of Joseph H. Heidt,
deceased.

The Court: You may note your appearances.

Mr. Robinson: Ralph W. Smith, Oliver O. Clark
and John Moore Robinson for Petitioner.

Mr. Melville: H. A. Melville for the Respondent.

The Court: Does the attorney for the Petitioner desire to make an opening statement of the issues in the case?

Mr. Clark: Yes, if your Honor please, and prior to making one, just so that it will be before the Court may I offer in evidence the Federal Estate Tax form 706. I understand that the Government has it.

The Court: Very well. It will be received in evidence as Petitioner's Exhibit No. 1.

Mr. Melville: Your Honor, may I at this point call to your attention that at the conclusion of the decision in this case Petitioner is not to get back this original return which the Federal Government has, so let it be marked if your Honor please as Respondent's Exhibit A or Exhibit 1.

The Court: Very well.

Mr. Robinson: We will stipulate that may be returned to the Respondent.

The Court: Joint Exhibit A-1. Do you want to substitute a photostate for it? [35]

Mr. Melville: Well, I have a duplicate of that which I can use in briefing. Yes, your Honor, we will substitute a photostatic copy.

The Court: Very well. Permission is granted to substitute a photostat copy and it is received as Joint Exhibit A-1.

(The tax form referred to was marked and received in evidence as Joint Exhibit A-1.)

(Testimony of Louise Seeley.)

Mr. Melville: Are you now changing your testimony that you were married in 1892?

The Witness: Well, when that was transferred to me.

Mr. Melville: Don't you know when you were married?

The Witness: I just don't quite remember at the present time.

Q. (By Mr. Clark): I see the date here, Mrs. Seeley, showing that it was recorded August 11, 1893, and I will ask you if that is the deed—— [42]

A. Yes, that is the deed.

Q. ——which was given to you——

A. Yes.

Q. ——by your father and mother?

A. It was given to me right after I was married to Mr. Heidt.

Q. As a wedding gift?

A. As a wedding gift, yes, my wedding present.

Q. It was right after you were married to Mr. Heidt, about how long after you were married to him?

A. About two months.

Mr. Clark: We offer this in evidence as the Petitioner's exhibit, in evidence, as Petitioner's Exhibit No. 2.

Mr. Melville: No objection providing I may have a copy of it, your Honor.

The Court: Can you furnish a copy?

Mr. Clark: Yes, we will furnish them with a photostat copy.

(Testimony of Louise Seeley.)

The Court: Very well. Permission is given to substitute a photostat for Petitioner's Exhibit No. 2.

(The deed referred to was marked and received in evidence as Petitioner's Exhibit No. 2.)

Q. (By Mr. Clark): At the time when were married to Joseph H. Heidt, [43] did you have any cash? A. Yes, I did.

Q. About how much?

A. About \$1500.00 or something on that order.

Q. Where did you obtain that money?

A. Well, my dad gave it to me and I worked before I was married, had charge of hotels and restaurants.

Q. And you had saved it? A. I saved it.

Q. Did Joseph H. Heidt have any money at the time you married him? A. Nothing, no sir.

Q. Did he have any real or personal property other than his purely personal effects like wearing apparel? A. No, sir.

Q. You don't know?

A. No, sir, he didn't have any.

Q. During the lifetime of Joseph H. Heidt after your marriage to him did he acquire any property, real or personal, by inheritance?

A. None at all.

Q. Did anyone give to him any property either real or personal after your marriage and before his death? A. No, they didn't.

(Testimony of Louise Seeley.)

Q. Did you after the marriage of yourself and Joseph H. Heidt [44] engage in any business?

A. I had my own business, he had his business.

Q. What business did you engage in?

A. I had apartments and started apartments in Los Angeles and redecored, fully redecored, and took charge of them, took care of them, was manager and had different buildings, worked with very many properties, different buildings in town.

Q. And did you for a time hold a license as a real estate agent in this city? A. Yes, I did.

Q. For how long a time?

A. Not so very long

Q. Well, can you approximate it?

A. About four or five years.

Q. During that time did you buy and sell property? A. Yes, I did.

Q. What business did Mr. Heidt engage in?

A. Well, he was in the market, 3rd and Central Market, he opened a market. He was the first market in Los Angeles.

Q. Was he dealing in vegetables?

A. Just potatoes.

Q. Just potatoes?

A. Potatoes and onions, plantations of potatoes and onions. [45]

Q. Potatoes and onions, you say? A. Yes.

Q. About when with reference to the time that you and he were married did he begin that business?

A. Well, right shortly afterwards.

(Testimony of Louise Seeley.)

Q. Well, by shortly, you mean about how long afterwards?

A. Well, he started right just about four months after we were married.

Q. And he continued in it up until what time?

A. Until about eight years before he passed away.

Q. And he died in what year? A. 1942.

Q. You say he continued in that business up until about eight years before he died?

A. Before he passed away, yes.

Q. During the eight years before he died, did he engage in any other business? A. No.

Q. Did he at any time fail while he was engaged in the business? A. Yes, sir.

Q. Twice? A. Yes.

Q. Do you remember about when those occurred?

A. Well, I could remember. All this money is lost. [46] I just couldn't remember the times.

Q. Did you and Mr Heidt have an attorney representing you in your business matters during that period of time?

A. Yes, Mr. Bull. Mr. Bull was our attorney for years.

Q. Ingall W. Bull?

A. Ingall W. Bull.

Q. Who is now a Superior Court Judge in this county? A. Yes.

Q. Will you state to the Court what you did with this money that you had when you were married to Mr. Heidt and the real property which your

(Testimony of Louise Seeley.)

father and mother gave to you as shown by the deed in evidence?

A. Well, the money that I had, the property that I had that my folks gave to me I traded the Colton house for a store, Angel's Flight, South Broadway, then I started in business with the money that I had saved.

Q. What business did you start in?

A. I gave him money to start his business in there.

Q. You gave Mr. Heidt money to start his business?

A. Yes.

Q. And he used it for that purpose?

A. Yes.

Q. You say you traded that home place they gave to you for the property on Broadway? [47]

A. Right on South Broadway.

Q. Was that over right by the Angel's Flight there?

A. Yes, right at the foot of the Angel's Flight.

Q. Was it income property?

A. Yes, a regular store.

Q. What did you do with that property?

A. Well, I sold it, then went out to Boyle Heights, it was then, and I bought a lot.

Q. At the time you sold it?

A. Yes.

Q. Do you remember how long you kept it?

A. I had it about six or seven months.

Q. During that time did you receive some income from it?

A. No.

(Testimony of Louise Seeley.)

Q. From the store?

A. No, not very much, no.

Q. Then you did what with that property?

A. Then I sold it and I bought a lot in Boyle Heights and I built a home on there, a little four-room cottage.

Q. Do you remember about how much you got for the property when you sold it?

A. It wasn't very much. I think about a couple of thousand dollars.

Q. All right. How much did you invest in the lot and the building of the home in Boyle Heights?

A. Well, the lot I paid \$300.00 for the lot, that is in Boyle Heights.

Q. How much did you spend for the improvement of it with the home?

A. Well, we built a four-room cottage on it.

Q. Do you remember about how much it cost?

A. Well, I couldn't tell you, because I don't know about the cost of that little house.

Q. What moneys did you use in buying that lot and building that home?

A. Well, I had some saved up and my mother gave me some to help us along.

Q. Your mother gave you money? That is, after you were married?

A. Yes.

Q. About how much money did she give to you?

A. She gave me 400 and my dad gave me 800 to pay for the place.

Q. That was built for your home place in Boyle Heights, that building?

A. Yes.

(Testimony of Louise Seeley.)

Q. What did you do then with the property?

A. Well, then I sold it and bought one on Washington Street, a place on Washington Street. [49]

Q. The home place? A. Yes.

Q. Do you remember what you paid for that?

A. That was \$2000.00.

Q. \$2000.00? A. Yes.

Q. What moneys did you use to pay for that place?

A. Well, I had been working in the meantime. I worked in hotels in the meantime.

Q. You say in the meantime you had been working in a hotel? A. Yes.

Q. What hotel?

A. In Redlands, took charge of the Theresa Valley Hotel.

Q. How long did you work there?

A. Oh, a couple of years.

Q. Did you get paid for it? A. Oh, yes.

Q. Did you use any of the money in buying the Washington place that you obtained from the sale of your Boyle Heights place? A. Yes, I did.

Q. Then what did you do with that place?

A. Well, I sold that place, and then I bought the lot, [50] the place on Ruth Avenue, and took the old house out and built the Boyle Apartments on. I was going to rent them, and I built and furnished it and I ran it for about four years, then I sold out the furniture with the leases and still have that.

(Testimony of Louise Seeley.)

Q. Now, you say you bought the lot and moved a house off of it and built the Boyle Apartments on Ruth Street in this city?

A. I took the old house place and just moved it and built the Boyle Apartments there.

Q. How large were those apartments?

A. 12 apartments.

Q. What moneys did you use in buying that lot and in building the Boyle apartments?

A. Well, just put in the money I had. I couldn't say exactly how much money I did use there, for I never kept track of that.

Q. Did you use moneys that you had obtained from the sale of the property on Washington Street?

Mr. Melville: I object to that, your Honor. The witness doesn't have to be led, and I ask that counsel refrain from leading the witness.

The Court: Yes, don't lead your witness.

Q. (By Mr. Clark): During that period, that is, while you were acquiring [51] and building the Boyle Apartments on Ruth Street, were you doing any other work?

A. No, I couldn't, because I took charge of the building.

Q. And you say you furnished it?

A. I furnished it.

Q. All of the apartments?

A. All of the apartments, yes.

Q. After it was completed and furnished, who operated it?

A. Well, I operated it.

(Testimony of Louise Seeley.)

Q. You didn't lease it out?

A. No, not at first. I ran it four years before I sold the furniture and leased it.

Q. You ran it four years?

A. Then I sold the furniture and leased the building.

Q. Do you remember how substantial an income you obtained from the operation of the apartments?

A. Well, it is easy to explain that. I will just give you the numbers of the apartments and the rooms, if you wish me to.

Q. Just generally, there is no need for so much detail.

A. Well, 12 rooms upstairs, and that would be about \$3.00 a week, then the apartments down stairs, about \$40.00 a month. There are four apartments downstairs. There was one [52] was my own I kept.

Q. What did you do finally with the Boyle Apartments?

A. Well, I built the Elmo Hotel then on Ruth Avenue between Eighth.

Q. What did you do with the Boyle Apartments?

A. Leased it.

Q. You leased it?

A. I sold the furniture and leased out the building.

Q. Then you say you acquired some other property? A. Yes.

Q. What property?

A. The Elmo Hotel on Ruth Avenue, same street only the next block.

(Testimony of Louise Seeley.)

Q. How large a building was that?

A. I think that was three stories, I think just rooms.

Q. Was that furnished or unfurnished?

A. I never ran that, just built it and rented it to a Japanese at the time.

Q. To a Japanese? A. Yes.

Q. How long did you keep that property?

A. Well, I think we still had it when Mr. Heidt passed away.

Q. You still had it, and is that one of the properties on which you held title jointly when Mr. Heidt died? [53] A. Yes.

Q. The Elmore Apartments?

A. No, not the Elmore Apartments, the Elmo Hotel. The Elmore is another place on Pico Street.

Q. I don't quite understand.

A. It's kind of hard to make you understand.

Q. This hotel, you say that you acquired on Ruth Avenue. A. Yes.

Q. Or Ruth Street, was it the Elmo Hotel?

A. Elmo Hotel.

Q. E-l-m-o? A. Yes.

Q. I was thinking of Elmore. And that property, you say, was retained until Mr. Heidt's death?

A. Yes.

Q. All right. What other property did you acquire?

A. Well, I had the Elmore Apartments on 39 South Hoover Street.

Q. 39? A. 1319 South Hoover.

(Testimony of Louise Seeley.)

Q. Do you remember about when it was that you acquired that property? A. Yes, I do.

Q. When was it? [54]

A. I bought a home at Lafayette Square, and then I traded the Lafayette Square property and gave \$9000.00 difference and I got the Elmore Apartments.

Q. Do you remember what the total price was that you paid in trade and in money for the Elmore Apartments?

A. Well, for the whole thing, close to 20,000.

Q. About \$20,000.00?

A. Yes, with the exchange deal and the furniture and everything for those apartments.

Q. I understood you to say about \$9000.00 of that price was paid in money. A. Yes.

Q. Where did you get the money?

A. I saved it up, kept on working and saved it and accumulated it that way.

Q. From the transactions you have been referring to?

A. From the different transactions, yes.

Q. How long did you keep the Elmore Apartments?

A. Well, I had the Elmore Apartments for about—sold 1938.

Q. You sold in 1938? A. Sold in 1938.

Q. During the time you had it, did you have an income from it? A. I ran it myself. [55]

Q. You ran it yourself? A. Yes.

(Testimony of Louise Seeley.)

Q. For how many years did you run it yourself?

A. I think some four or five years.

Q. That is the Elmore Apartments?

A. The Elmore Apartments.

Q. You say that after which you disposed of that property?

A. Yes.

Q. About when?

A. Well, that is closed to 1938, because I bought the ranch for that.

Q. What did you do with the money obtained from that?

A. I bought the ranch out at Chatsworth.

Q. Do you remember what you received for it?

A. No, I don't quite remember that.

Q. Approximately. [56]

The Court: What is this property you are inquiring about?

Mr. Clark: The Elmore property, your Honor, apartments.

The Witness: That is 1319 Hoover.

Mr. Melville: That was part of the estate, is that correct?

Mr. Clark: It was her property. They acquired that and disposed of it during the marriage. Mrs. Heidt got the proceeds from it. The proceeds of that property went into the Elmore, which is one of the properties that stood in their names as joint tenants when he died.

Mr. Melville: But that is the Elmore Apartments, isn't it which they had at the time of the death.

Mr. Clark: I will ask.

(Testimony of Louise Seeley.)

Q. How many acres of it was improved in lemon trees?

A. It was all improved with lemon trees.

Q. Do you know the name of that ranch? Did it have a name?

A. Stony Point Ranch.

Q. Stony Point Ranch?

A. Stony Point Ranch the name was.

Q. Do you remember about when that ranch was purchased?

A. Oh, somewhere around 1940, I think, 1938.

Q. Around about 1938, you think?

A. Yes.

Q. And do you remember about what was paid for it?

A. Well, I traded some lands for it. I traded the Rosemount tract that I had, the business, and paid a cash difference.

Q. Do you remember what the total price was, including the value of the lots and the cash?

A. There were seven lots that I think I traded in for some three hundred and some odd dollars apiece.

Q. That would make about \$2100.00 in lots? [60]

A. Yes.

Q. And how much in money did you pay for the Stony Ridge Ranch?

A. Well, about 20, some 20 some odd thousand dollars and that was added right on to it.

Q. How long did you keep that ranch?

A. A couple of years.

(Testimony of Louise Seeley.)

Q. A couple of years. And during that time did you do anything respecting its care?

A. I stayed in town most of the time. I was in the city taking care of the apartments.

Q. Then was the Stony Ridge Ranch sold?

A. Yes.

Q. And what did you get for that when you sold it?

A. I think about \$25,000.

Q. About \$25,000.00. Was that obtained in money or real property?

A. That was obtained in money.

Q. In cash?

A. Yes.

Q. All right. What other property did you buy?

A. Then I bought a place. Got another apartment building.

Q. Where was that?

A. That was over in Beverly Hills, a home in Beverly [61] Hills on El Camino.

Q. You say you bought a home on El Camino in Beverly Hills?

A. Yes.

Q. Do you remember what you paid for it?

A. No, I don't remember.

Q. Approximately even you don't recall?

A. No.

Q. How large a home was it?

A. Well, it was about eight rooms.

Q. About eight rooms. And did you live there for a time with Mr. Heidt?

A. Yes, for about a year.

Q. For about a year?

A. Yes.

(Testimony of Louise Seeley.)

Q. And then what did you do?

A. We bought another ranch in the Valley.

Q. In the San Fernando Valley?

A. Yes, I bought it as a present.

Q. You say you bought a ranch there?

A. Yes.

Q. How large a ranch?

A. About 12 acres of walnuts.

Q. Was it all planted to walnuts?

A. Yes. [62]

Q. Were they all bearing at the time you bought it?

A. Yes.

Q. Were there any buildings on the ranch when you bought it?

A. Yes, there were two houses on it.

Q. Two houses?

A. Yes.

Q. Did that ranch have a name by which it was commonly referred to?

A. No.

Q. How much was paid for that ranch?

A. I don't quite remember. I couldn't remember.

Q. Approximately, are you able to recall?

A. No, I can't say.

Q. Was that property in the name of yourself and your husband as joint tenants when he died?

A. Yes, I believe it was.

Q. How is that?

A. Yes, I think it was.

Q. That is one of the properties involved here?

A. Yes.

Q. What moneys and properties did you use in your purchase of that ranch, the walnut ranch?

(Testimony of Louise Seeley.)

A. Well, just different things that we accumulated by trading, and such as I sold out buildings, I sold the [63] furniture and realized adequate income of it and that paid for both.

Q. Did you acquire any other properties?

A. Yes.

Q. What other properties?

A. Well, we had a place on Plymouth Boulevard, a bungalow.

Q. A bungalow on Plymouth Boulevard?

A. Yes.

Q. Do you remember how much was paid for it?

A. That was traded for a duplex. I traded the duplex on Camino Street for it.

Q. I don't quite understand. You say you had a duplex and traded the duplex for it?

A. No, we traded the duplex for this ranch at Encino.

Q. The ranch you are speaking of, is that the walnut ranch?

A. No, the Encino ranch, there is another ranch.

Q. We are speaking of the bungalow that you spoke of. You say that you purchased a bungalow?

A. Yes, on Plymouth Boulevard.

Q. And you kept it about how long?

A. A couple of years.

Q. And then did you dispose of it, did something with it? [64]

A. I sold it.

Q. Do you remember what you got for it?

A. I am not quite sure. I am not sure of it, but I think it was \$3500.00.

(Testimony of Louise Seeley.)

Q. A minute ago you spoke of another ranch, the Encino ranch. A. Yes, Encino.

Q. Where was that located?

A. It is right up in Encino. That was an orange grove.

Q. In the San Fernando Valley? A. Yes.

Q. Did you have title to that property at the time of his death?

A. Well, that has been sold, too.

Q. Before Mr. Heidt's death? A. Yes.

Q. About when did you buy the Encino ranch?

A. Well, the Encino was traded with this duplex on Catalina Street and extra.

Q. I don't understand.

A. It was traded for the duplex and the extra, if that is what you mean.

Q. I am asking you about what you paid for the Encino ranch. A. It was a trade. [65]

Q. You traded something for the ranch?

A. A duplex, on Catalina Street.

Q. I understand you traded the duplex for the Encino ranch. A. Yes.

Q. Do you remember what the stated purchase price in that deal was for the Encino ranch?

A. I don't know. I couldn't say. I think it was an even trade for the ranch and the duplex at that time.

Q. How many acres in that ranch?

A. Ten acres.

Q. Was it improved?

A. With an orange grove, orange grove and house.

(Testimony of Louise Seeley.)

Q. Orange trees in bearing? A. Yes.

Q. Did you say a house? A. Yes.

Q. What did you do with the Encino ranch?

A. Well, that was sold.

Q. Sold to whom?

A. Sold to some owner, I think, from the east, one of the stars.

Q. And do you remember what was obtained for it? A. I think about \$25,000.

Q. About \$25,000.00? [66]

A. Yes, I think so.

Q. Was it in money? A. Yes.

Q. What did you do with that money?

A. Well, I think we just kept on going, and all the money I traded I just kept right on turning over.

Q. Did you acquire any other properties during the period of your marriage with Mr. Heidt?

A. Yes, I had a house on 119 Pleasant Street.

Q. A house at 119 Pleasant Street?

A. 119 Pleasant Street.

Q. In this city?

A. Yes, in Boyle Heights. That is the first one.

Q. How large a house was that?

A. A four room cottage. I am sorry I can't give that number quite as it was, but I just can't think of those places.

Q. Do you remember any other properties that you dealt in during that period?

A. 2030 Griffith, built three houses on the property.

(Testimony of Louise Seeley.)

Q. Three houses at 23rd and Griffith that you say that you built? A. Yes, I built them.

Q. You built them? A. Yes.

Q. Who purchased the land? [67]

A. I bought the corner lot.

Q. And then you built?

A. And then I put the houses on it, and this was 20 years ago, I know that.

Q. Were they later sold?

A. I rented them and then I sold them afterwards.

Q. Now, are there any other properties you recall now that you dealt in during that period?

A. It's pretty hard to tell. They ought to have it all here. I can't hardly think of it. I didn't expect to have to keep track. You can't—

Q. During that period did you have any bank accounts in your name? A. Yes, I did.

Q. In what bank or banks?

A. The Bank of America.

Q. Which branch or office?

A. Well, I had Pico and Hoover, I think, for the Dunsmuir, and then I was in Washington Boulevard, with the Heidt Apartments, and then I had one in Redlands.

Q. You have named three branches of the Bank of America in which you carried an account.

A. Yes.

Q. And did you deposit moneys in those accounts that you obtained from transactions you made?

A. Yes, I did.

(Testimony of Louise Seeley.)

Q. (By Mr. Clark): Did you carry a bank account in any other bank than the three branch banks of the Bank of America?

A. Well, the California bank.

Q. In the California bank.

A. In Beverly Hills.

Q. During that period of time did Mr. Heidt carry any bank account of his own? [69]

A. Yes, he did for a while, then we had a joint accounts.

Q. Now, you mentioned a moment ago the Heidt Apartments.

A. Yes.

Q. You hadn't mentioned those earlier. Where were those located?

A. 1706 Santee Street.

Q. 1706 South Santee Street in this city?

A. Yes.

Q. About when, as you now recall, did you acquire those Heidt Apartments?

A. Well, that was built. That was the first apartment built in that neighborhood on Santee, 12 apartments.

Q. Did you build them?

A. Yes.

Q. You bought the lot?

A. This was 25 years ago, over 25 years ago.

Q. How large was that apartment?

A. 12 apartments.

Q. 12 apartments?

A. Yes.

Q. How long did you keep them?

A. Oh, several years. I just sold them recently.

Q. Did you have them on hand at the time of Mr. Heidt's death? [70]

A. Yes, I did.

(Testimony of Louise Seeley.)

Q. That is one of the properties involved here?

A. Yes.

Q. During the time that you held those apartments before the death of Mr. Heidt, was there a constant income from them? A. Yes.

Q. Who took care of the renting of them and the collecting of the income and managing and handling that property?

A. I ran the Heidt Apartments myself, I didn't have a manager, I took charge of the work, and then later on, of course, we sold them and he lost it and then we had to take it back, and then I put a manager in there.

Q. Now, when Mr. Heidt died, did you also have some apartments on Dunsmuir Avenue?

A. Yes.

Q. About how many?

A. On the corner of Dunsmuir and Eighth Street, and one at 7045 Dunsmuir.

Q. And those were properties that you held in joint tenancy at the time of Mr. Heidt's death?

A. Yes. Well, the one at 745 Dunsmuir he gave me for Christmas present.

Q. About when was that?

A. That was about ten years ago. [71]

Q. About ten years ago? A. Yes.

Q. Did you have a conversation with him at that time? A. Oh, yes.

Q. Where did the conversation take place?

A. Right in the place there. He wanted to know if I liked that building like that, and I said yes.

(Testimony of Louise Seeley.)

Q. Just a moment. At the time of that conversation, was anyone present besides you and Mr. Heidt?

A. Mr. Kenny and the owner of the property was there, the man that we bought the property from.

Q. What did Mr. Heidt say to you?

A. Mr. Heidt said right in front of him, "I gave my wife a Christmas present, everything I have got is hers, I want her to have everything, no matter what I have, if anything should happen to me."

Q. How large a house was that?

A. That is six apartments and a penthouse upstairs.

Q. Do you remember about what they were renting for at the time of his death?

A. Well, it is in the record that is right here, it is the same prices that it was then, because some of these tenants simply ruined the building.

Q. Did you occupy one of the apartments in that building? [72]

A. No, sir, because——

Q. Did you live in another apartment on Dunsmuir?

A. 8th Street and Dunsmuir, next door to it. It is the corner.

Q. You had that apartment at the time of Mr. Heidt's death? A. Yes.

Q. How many apartments in that building?

A. Seven.

(Testimony of Louise Seeley.)

Q. What were the rentals from that?

A. Well, 65 and 75 and 60, something like that, went down.

Q. How was that acquired, was it built?

A. No.

Q. It was not built, you bought that?

A. No, we bought that.

Q. About what year was that that those two apartments were acquired?

A. About 10 years.

Q. About 10 years ago? A. Yes.

Q. Now, that other apartment on Dunsmuir, as I understand it, was some of the property that was in joint tenancy at the time of Mr. Heidt's death?

A. Yes, the corner. [73]

Q. How? A. The corner, I think.

Q. Do you remember now of any other properties that you dealt in during your marriage to Mr. Heidt?

A. Well, of course, I have managed other properties besides my own, you know, took charge and furnished and decorated them and all this, although it was not my own property.

Q. You mean for other persons?

A. Yes, other people.

Q. Over how long a period of time did you do that type of work?

A. Well, about 10 or 12 years.

Q. 10 or 12 years. By that you earned some compensation? A. Yes.

(Testimony of Louise Seeley.)

Q. Well now, did you at one time have some property transaction with a Japanese?

A. Yes.

Q. And as I recall, in the joint tenancy property on hand at the time of the death of Mr. Heidt there was a trust deed which secured a note that was payable to yourself and Mr. Heidt as joint tenants and which was executed by a Japanese. Will you tell the Court what that transaction was?

A. Well, it was leased personally to a Japanese at first and then he bought it afterwards. [74]

Q. I don't quite understand that. You say the Japanese bought the property?

A. He bought it.

Q. And how did it occur that you took the trust deed to which reference has been made?

A. I don't know. I couldn't tell you that.

Q. Was that taken as part of the purchase price?

A. It must have been. Mr. Heidt took full charge of that deal. I had nothing to do with the building. Mr. Heidt took full charge of that building.

Q. Where was that building located?

A. That is on Ruth Avenue and Stanford Avenue.

Q. In this city? A. Yes, Los Angeles.

Q. Do you remember about when you acquired that property?

A. Well, he built it. Mr. Heidt built it.

(Testimony of Louise Seeley.)

Q. This is not one that you have heretofore testified to?

A. No, that is another. He built that.

Q. How large a property is that?

A. That is just a hotel.

Q. That was a hotel? A. Yes.

Q. About when was it built? [75]

A. That has been built about 14 years ago.

Q. How large a hotel building was that?

A. Well, I think it was two stories, but I don't know, I don't know how many rooms, but it is two stories, I don't remember how many rooms, I have never paid much attention to that.

Q. So you had that building for a few years and finally sold the building to a Japanese?

A. The Jap is still paying, because the manager is still taking care of it for him.

Q. So it was occupied by the Japanese?

A. Yes.

Q. But you had a substantial income from it?

A. Yes.

Q. At the time of the death of Mr. Heidt, you had money on deposit, as I understand it, in a checking account in the California Bank at 9441 Wilshire Boulevard in Beverly Hills. A. Yes.

Q. Do you know where the moneys came from that were in the account at the time that Mr. Heidt died?

A. Well, he just sold out different properties at different profits and that we had accumulated that way, you know.

(Testimony of Louise Seeley.)

Q. From the transactions to which you have referred? A. Yes. [76]

Q. And also there were on hand at the time that Mr. Heidt died 20 United States Defense Bonds of the par value of \$2000.00? A. Yes.

Q. Do you remember the incident of the purchase of those bonds?

A. He just got them for me, so I saved them. He presented me with those.

Q. He did? A. Yes, he did.

Q. About when was it that he presented you with those bonds?

A. Well, just as soon as the war broke out, the war hadn't broke out yet, he thought he better get the bonds.

Q. Did you have any conversation with him at the time you say he presented them to you?

A. Yes.

Q. Where did that take place?

A. Right at my home.

Q. Where was that?

A. That was at the ranch. You you mean where we lived? 745 South Dunsmuir Road.

Q. In these Dunsmuir Apartments, at your apartment? A. Yes.

Q. Who were present at the time that he presented these [77] defense bonds to you?

A. Well, he just handed them out to me just in the house.

Q. Was anybody present but you and Mr. Heidt?

A. Yes, sir, Mr. Heidt.

(Testimony of Louise Seeley.)

Q. What did he say?

A. He says, "Everything I have I want you to get, anything I have, and there is nothing to worry about, we don't owe anything and I am glad you have made it and you worked harder than I did, and that is why if anything does happen to me you can get these bonds and use them."

Q. Did he have the bonds with him at the time?

A. They were in the bank, in the box.

Q. Did you at one time in the course of the business dealings during the period to which we have referred purchase a piece of property from Mr. Bullock? A. Yes.

Q. Where was that? Have you heretofore testified to that piece of property?

A. Yes, it was the corner there of West Moreland.

Q. That is the Westmoreland property?

A. Yes.

Q. Was that later sold?

A. We sold it back to Mr. Bullock when he started the store, because he said he thought he needed that lot. [78]

Q. Do you remember what you received for the sale of that property to Mr. Bullock?

A. Well, we sold it for \$100,000.00.

Q. About \$100,000.00? A. Yes.

Q. Was that after a lot of expenses and taxes and assessments in connection with the opening and improving of Wilshire Boulevard?

(Testimony of Louise Seeley.)

A. Yes, on Wilshire Boulevard, and they had all the lots on that street, and everything was assessed for the two streets all around, all between the two.

Q. When you finally got through with all of it, how much did you have left?

A. I think it was about 38, and I didn't have the cash on hand at the time, it was not cash that was paid but he charged that and paid that off. We didn't——

Q. You say you only had about \$38,000.00 left out of \$100,000.00?

Mr. Melville: She didn't say that.

Mr. Clark: Yes, that is what I understood her to say.

The Witness: Yes, that is all.

Q. (By Mr. Clark): Would you tell me how much? I understood you to say that that was the fact.

A. That was the fact.

Q. Now, in Schedule 6 attached to the estate tax return in evidence here, there are enumerated eight items, Mrs. Seeley, and Item No. 1 describes a certain real property situated in that portion of the southwest corner Section 14, Township 2 North, Range 16 West, Ranch Exhibition at San Fernando described as follows, and then follows the metes and bounds description.

A. Yes.

Q. Without reading the metes and bounds description, do you identify that property as one to which you have heretofore testified?

A. One of those ranches, yes.

(Testimony of Louise Seeley.)

Q. Which ranch is this now?

A. I have to count them up, because I don't know about the addresses of all of those. I have to count them up. I don't know which one.

Q. This was one that was acquired and held at the time of Mr. Heidt's death.

A. That is the North Ridge Ranch.

Q. The North Ridge Ranch to which you have heretofore testified?

A. That is where that was, North Ridge Ranch.

Q. And that property was acquired upon what consideration?

A. Well, he paid cash for it. He paid and wanted cash and then I sold the land in Palm Springs and put the money in there, then I went to somebody else in Palm Springs because he paid the cash and borrowed the money. I don't know that part of it. He had the money to pay, but this is some friend that—he didn't like that, he wanted to have the ranch, and he borrowed from somebody else and I sold the Palm Springs place and gave it to him so he could pay that man off.

Q. How much did you get out of the sale of the Palm Springs place?

A. I sold it for \$9000.00.

Q. What did you do with the \$9000.00?

A. Put it right in on this ranch, gave it to Mr. Heidt.

Q. The North Ridge Ranch?

A. The North Ridge Ranch, yes.

(Testimony of Louise Seeley.)

Q. Parcel No. 2 is described as lots 53 and 54 in Tract No. 4404 of the City of Los Angeles. Do you recognize the location of that property from that description?

A. No, I don't. I don't know much about the numbers of tracts. I will be very frank, I wouldn't know which one.

Q. The return stated it was valued at the time of the death of Mr. Heidt for \$55,000.00. Do you remember now what property that was?

A. Well, it must have been the—that was the North Ridge Ranch.

Q. No, this is in the City of Los Angeles. It is referred to as Lots 53 and 54 in Tract No. 4464.

A. That is the Dunsmuir property, I guess.

Q. That is the Dunsmuir property which you have testified about?

A. The only thing I can think of.

Q. Then the next parcel, Parcel No. 3 is described as Lots 24 and 25 of Sunset Court Tract. Do you remember that property?

A. That is around Sunset, that is what that is.

Q. Have you previously testified to that?

A. No, I have not.

Q. About when were those acquired?

A. Well, they were about 15 or 17 years old when we bought them.

Q. Did you buy them or build them?

A. No, we bought them.

Q. And do you remember how much was paid for them?

(Testimony of Louise Seeley.)

A. I think it was 15,000 for one and I don't know what this other one was.

Q. Do you have any recollection of an approximate sum?

A. Well, it must have been around twelve or fourteen for the other one. [82]

Q. 12,000 or 14,000 for the other? A. Yes.

Q. What moneys were used for that? Did you have the price of those two properties?

A. Well, I think the money was accumulated, that is the only way, we accumulated it, both working.

Q. From the transactions you have described?

A. From the transactions, and I worked.

Q. Parcel No. 4 is described as Lot 86, Tract 7710 in Beverly Hills, do you remember?

A. That must be the El Camino house. That is all I can think of.

Q. The El Camino house? A. Yes.

Q. Do you remember the price on that? The return shows that this property has been sold for cash since November 22, 1942, at \$11,000.00. Do you identify that from that?

A. I think it was 9000.

Q. How?

A. About 9000 or 10,000, I think it was.

Q. It is stated that it was sold for 11,000 after November 22, 1942. Do you identify the property from that? A. Yes.

Q. Was it improved?

A. It had a house on it.

(Testimony of Louise Seeley.)

Q. Is that the El Camino property you referred to?
A. Yes.

Q. Then Item No. 5 is the promissory note given by the Japanese in the sum of \$16,000.00. That is the note and transaction you have testified to?

A. That is the note, yes.

Q. Then Item No. 6 is moneys held in the Bank of America in joint tenency in the names of yourself and Joseph H. Heidt, and on November 22, 1942, there was a balance of \$21,951.37. Do you know what accounts those moneys came from?

A. They came from different rents that rented buildings and apartments.

Q. From the businesses to which you have heretofore testified in which you were engaged?

A. Yes.

Q. Then Item No. 7 is the checking account in the California Bank at 9441 Wilshire Boulevard with a deposit on hand at the date of his death of \$109.02. You have already testified, as I recall, to that item.
A. Yes.

Q. Now, Item No. 8 consists of 20 United States Defense Bonds, to which you have heretofore testified. Now, Mrs. Seeley, during Mr. Heidt's life time and while he was engaged in business, did he make money as well as lose money within your personal knowledge? [84]

A. Oh, yes, he made a lot of money but he lost twice.

(Testimony of Louise Seeley.)

Q. And who took care of the payment of the living expenses of yourself and Mr. Heidt during his life time after your marriage?

A. Well, he took care of all that.

Q. Paid it from his earnings, did he?

A. Yes, he did.

Q. Now, did you have any conversation with Mr. Heidt at any time when title to properties were taken in your name as to what he intended as to who actually should be the owner of it?

A. Well, he always told me that everything that he ever made or whatever property we had, regardless of what it was, that it is all mine. He says, "I am just working for you and that is all, because you have been so wonderful and worked so hard, so everything belongs to you" regardless of what he had, anything he made, everything he had he would leave it to me.

Q. Are you able to say from your personal knowledge of the facts whether or not the net earnings of Mr. Heidt in the business in which he engaged during the period of your marriage exceeded the cost of living of yourself and Mr. Heidt at the time of your marriage?

A. Yes, he always supported me.

Q. He has always supported you?

A. Yes, he has.

Q. And were his earnings during that period in excess of what it took for your living?

A. Oh, not always.

Q. Not always?

A. No.

(Testimony of Louise Seeley.)

Q. Did you ever fail in business while you were engaged in business?

A. No, I never have.

Mr. Clark: Cross-examine.

Cross-Examination

By Mr. Melville:

Q. How much money did you say you had when you were married?

A. Well, I had \$1500.00 and I had a check, and my father and mother, different checks, gave me a check to help me out, you know, different times, the folks from Colton.

Q. Where was that \$1500.00?

A. That the folks gave me?

Q. Yes.

A. Well, part of it—mother gave me part of it and my father gave me part of it.

Q. Where was it? Did you have it in the bank?

A. Yes, and I had some property. It was right around near that in the bank and I had some property at Redlands. [86]

Q. How much did you have when you were married?

A. Well, I had 238 and 1500 and I had 800 besides the 1500, 800 and 300, about 2500, I guess, altogether.

Q. You had an even 1500, did you say?

A. Yes, a little over 1500.

Q. Was it exactly 1500?

A. Yes, I think it was.

(Testimony of Louise Seeley.)

Q. Where was it?

A. In Colton. I had it in Colton at the time I was married.

Q. You still had it when you were married?

A. Yes.

Q. Did you spend it?

A. No, that is the way I started in, you see.

Q. You had it in the bank?

A. No, the money never got in the bank. My folks gave me and I went out in Redlands and bought some property, bought a lot for myself in Redlands and one in Colton. I explained that originally.

Q. Did you earn money before you were married?

A. Sure, I had charge of different hotels.

Q. I see. You had saved by the time that you were married about \$700.00 or \$800.00 you had in the bank?

A. No, I gave it to the folks and told them to save that for me, because I was nothing but a kid, so I told mother to give it back, and she would.

Q. You had saved up \$800.00 that you had given to your folks to hold for you. A. Yes.

Q. Then when you got married they gave you that money back?

A. Yes, they gave the money to me.

Q. And they gave you the money you put into a home? A. Yes.

Q. How much money did they give you altogether in the time you got married?

(Testimony of Louise Seeley.)

A. You mean how much money they gave me altogether?

Q. Yes.

A. Well, they gave me altogether, well, let's see, it is over a couple of thousand dollars all told.

Q. Did they give you that in cash or check?

A. No, mother never believed in checks, she always wanted to get the gold for it, would have nothing to do with a check, always had gold pieces.

Q. She gave you this roughly \$2000.00 in gold?

A. Yes.

Q. What did you do with it?

A. Well, I bought the property and different things, the folks were always with me, to see if it was all right, and said that it looked that it was all right, I started right in business.

Q. Precisely what did you have, did you have \$1500.00 and \$800.00, total \$2300.00, is that right?

A. Yes. I gave that to him, to Mr. Heidt, and he went in business at the start, I used part of it and started right in and gave him some.

Q. First in the picture there was \$800.00 which you had saved, had given to your folks to hold for you.

A. Yes, that was my own money, yes.

Q. Then when you got married they gave you back the \$800.00?

A. They gave me back the \$800.00.

Q. And \$1500.00 more?

(Testimony of Louise Seeley.)

The Court: I am afraid the reporter will get a confused record. Just ask one question at a time, Mr. Melville. [89]

* * * * *

Q. (By Mr. Melville): Is it a fact that at the time you were married you had saved——

A. Yes.

Q. ——\$800.00? A. Yes.

* * * * *

Q. That \$800.00 that you had given to your folks to save for you—— A. Yes.

Q. ——at the time you were married——

A. Yes.

Q. ——they gave you back—— A. Yes.

Q. ——at the time you were married——

A. Yes.

Q. ——your \$800.00—— A. Yes.

Q. ——in gold? A. Yes.

Q. And also gave you \$1500.00?

A. Also in gold.

Q. Also in gold? A. Yes.

Q. A total of \$2300.00? A. Yes.

Q. What did you do with the \$2300.00 in gold?

A. I gave it to Mr. Heidt when we were married so he could start in business, so he could start in with whatever he wanted to do, because he was—I gave it to him, part of it, I kept part myself, of course, so I could start right out and start in business somewhere, and then he put it in that store, so he changed it, so he started right in there that way again.

(Testimony of Louise Seeley.)

Q. Didn't you say a few minutes ago——

A. Yes.

Q. That your folks were with you when you bought property? A. Yes.

Q. With your own money? A. Yes.

Q. How much money of this \$2300.00 now——

A. Yes.

Q. ——how much did you give to your husband to start in business with?

A. I gave him about a thousand dollars.

Q. How much did you invest in real estate with your folks present?

A. Well, I took the rest of the money, not all of it, I didn't take all of it, but I saved some and gave some to the mother.

Q. How much did you save?

A. Well, I put a thousand into the other business that the folks ran, and I invested in Los Angeles after we were married.

Q. How much did you invest in Los Angeles?

A. Not a lot, I bought the building there.

Q. You had the \$2300.00 and you gave a thousand to your husband to start business with?

A. Yes.

Q. That leaves \$1300.00. What happened to it?

A. Well, just invested and used for the building and new curtains for the house and bought a house.

Q. Did you save any?

A. No, I didn't save very much because I started right in working again.

(Testimony of Louise Seeley.)

Q. When did you first obtain a real estate license? [92]

A. Oh, that has been about 20 years ago.

Q. What year would you say that was?

A. 20 years ago.

Q. Do you remember what year you obtained that real estate license?

A. Well, this is 1946. All right, 19 years ago.

Q. How long did you hold that real estate license?

A. Well, I didn't hold it—I think a couple of years.

Q. You are sure of that?

A. Yes, I think several years.

Q. What business was Mr. Heidt in before you married him?

A. Well, he was working in San Francisco for a firm, then he came up here, and as I said when he married me, of course, then we started to buying this property, started the store at the Angel's Flight, that is when he started in.

Q. Is that when he started the first market?

A. Yes, and then he opened a stall in Central Street Market.

Q. Did he buy them?

A. Well, he had a stall in there.

Q. He had what? A. Had a stall in there.

Q. Do they lease those stalls or do they buy them? A. No, you lease them.

Q. Did he have a stall there at the time you were married? A. No.

(Testimony of Louise Seeley.)

Q. Was he working in Los Angeles at the time before you were married?

A. No, he was in San Francisco, then we were married and he stayed here because I couldn't live there on account of my throat.

Q. So that he went into that market?

A. Yes.

Q. What year was that?

A. Well, let me think because what I say, what year was I married, let's figure this out straight now. I was 18 years old and I am 68. We will get this marriage business right now. Let's figure out what year it was.

Q. If you are 68 now and you were 18 when you were married, it must have been 50 years ago.

A. 50 years ago.

Q. That would make it 1916.

The Court: 1896, wouldn't it?

Mr. Melville: 1896, that is right.

The Witness: There is a mistake about the marriage, because I was married out of church the 8th of July, because we had a license in Los Angeles and we couldn't get married at home because Redlands is in Santa Barbara County, and I was [94] married in Los Angeles. I tried to prove that, your Honor, you can say that for me.

The Court: Well, answer as best you can.

The Witness: Because I don't want to get anything in that isn't true, I mean I don't want to mislead you.

The Court: Yes, that is all right.

(Testimony of Louise Seeley.)

Q. (By Mr. Melville): Did you describe your husband or was it your attorney who described him as the potato king.

A. Oh, anybody described him, the whole public called him that.

Q. He was known as the potato king?

A. Well, yes, I don't know anything about it, that is all, they called him, because he had plantations all over that he planted all the field. His own life time operator was to be potatoes. That is why they called him the potato king.

Q. He gave you a living from that business?

A. Yes, he made a lot of money, but he was broke a lot of times, then he gambled once more, then he got broke again.

Q. Do you know how much money he made in potatoes?

A. I knew that he lost money once in a while.

Q. He went bankrupt twice, I believe you testified.

A. I don't think they reported bankruptcy, because he [95] was too proud. He told me, "That is all the money I own." He didn't—he spent the money himself once, and then he started in again and worked out of it.

Q. When he lost everything, did anybody bring suit against him?

A. Oh, no, no.

Q. He was never sued?

A. No.

Q. He never went through bankruptcy?

A. No. You see the market broke down, that was the cause, you see, like you go together and have a big proposition, of course, and the market

(Testimony of Louise Seeley.)

went down and had to sell beneath the price of whatever it cost him. That is the way it was, the whole thing is gone.

Q. Did Mr. Heidt have an attorney during his life to look after his affairs?

A. Yes, Mr. Bull.

Q. Mr. who? A. Mr. Bull, Ingall Bull.

Q. What did Mr. Hickey have to do with his affairs?

A. Mr. Hickey had nothing to do, he was just a friend. I didn't know anything about Mr. Hickey. He came to the ranch and this and that, and we were just friends and I had to get him, you know what happened, I said he should take charge of Mr. Heidt's case, because he had heart trouble [96] and then he died of heart trouble on the ranch, because I didn't particularly have the money to take of anything, so I told him to take care of all this and he did, of course, then afterwards he passed away and I just had Mr. Clark. Everyone knows it.

Q. When did Mr. Hickey pass away?

A. I don't know when it is. When was that, now? I think it was last year. Was it two years ago? Was it, he passed away?

Q. I am sorry. I don't know.

A. I was just asking. I thought probably Mr. Clark knows it. You know finding your husband dead in bed, such a thing is awful. I couldn't think of nothing. That is why I can't remember.

(Testimony of Louise Seeley.)

Mr. Melville: May your Honor please, opposing counsel has offered to clear up this question of when Mr. Hickey passed away. Would you mind just stating that and let us stipulate?

Mr. Clark: Yes.

The Court: You may state in the record when Mr. Hickey passed away.

Mr. Clark: My recollection, your Honor, is this, that when I was called in the matter I went to Mr. Hickey's office and he then showed me a preliminary draft of the estate tax return and told me that he was unable to complete [97] it because he was not feeling well, and he wanted me to go ahead and complete it, so I did some work on it, and I would say that it was within at least two months after that time that the report was actually filed, and I think he died within a month or so, either within a month or so before the report was filed or after it was filed. As I recall now, he had been dead some little time, some weeks before I even learned about it.

The Court: What is the date of the return?

Mr. Melville: It was filed on June 14, 1943, your Honor.

Mr. Clark: I think he must have died somewhere between May and August, 1943.

The Court: Very well. That will be accepted as a stipulated fact as to the death of Mr. Hickey.

Q. (By Mr. Melville): Did I understand you to say that you had turned all of your papers over to Mr. Hickey in order that he might probate the estate?

(Testimony of Louise Seeley.)

A. I brought him everything to take care of my affairs and check up everything and just left it. I brought him everything, even the records that they hold for you at the bank, so he just took full charge.

Q. Did he probate the estate?

A. I don't know what it was. I couldn't tell, because [98] I was sick. I was at the ranch. I couldn't be in town at all. I just thought that he would know how to take care of it.

Mr. Clark: I am willing to stipulate that he did, your Honor.

The Court: Very well, that fact will be stipulated.

The Witness: I'm sorry I can't.

Mr. Melville: I think the estate tax report will show that it was not probated.

The Court: You mean there was no probate proceeding?

Mr. Melville: That is right.

Mr. Clark: You see in California it technically is probated by a petition for the termination of joint tenancy and fixation of the tax in that proceeding, and ascertainment is made of his affairs by order of the court, and then you ask leave to file a motion to set aside the joint tenancy of the property. That is what I meant when I said it was probated.

The Court: Very well, that will be understood as what is meant when you spoke of his probating the estate.

(Testimony of Louise Seeley.)

Q. (By Mr. Melville): On several occasions during your direct testimony you said——

A. Yes. [99]

Q. ——that your husband, your former husband——

A. Yes.

Q. ——had on more than one occasion explained that if anything ever happened to him he wanted everything to belong to you.

A. Yes.

Q. Is that the reason that the property was placed in joint tenancy?

A. I guess so, because he wanted me to have everything if anything happened to him. and if anything happened to him different that is the way he made it out.

Q. That was your understanding?

A. That was my understanding. That is the way I got it.

Q. If anything happened to him everything would go to you?

A. Yes.

Q. And if anything happened to you everything would go to him.

A. Yes, that is the way it was.

Q. And because of that understanding you had all your real property placed in joint tenancy.

A. Yes.

Q. And it is because of that same understanding that you carried all the bank accounts in joint tenancy? [100]

A. Yes.

Q. When these bonds were presented to you, were they made out in your joint names also?

A. They were made out just for me.

(Testimony of Louise Seeley.)

Q. Just for you? A. Yes.

Q. Then why did you include them in the gross estate?

A. I don't know what you mean. He gave them to me. Let's see what you mean now.

Q. Is that your signature on here, your signatures? Can you find your signature on here?

A. These two are mine.

Q. You then are the executrix of this estate?

A. Yes.

Q. You filed this estate tax return which is in evidence as Exhibit 1-A? A. I don't know.

Q. I call your attention to Item 8 on this schedule. The last item, No. 8, says: "20 United States Bonds of the par value of \$2000.00, decedent's one-half interest \$1000.00." I call your attention to the fact that decedent's one-half interest, \$1000.00, is written in pen and ink. Do you know who wrote that? A. That is my husband's writing.

Q. That is your husband's writing? [101]

A. Looks like his writing.

Q. I don't know how your husband could have prepared his own estate tax returns?

Mr. Clark: Well, she means her present husband. She only has one husband.

Q. (By Mr. Melville): That is your present husband's writing? A. Yes.

Q. Did he help you prepare this estate tax return?

A. I gave everything to Mr. Hickey, I gave him the bank books and everything. Afterwards I got Mr. Clark.

(Testimony of Louise Seeley.)

Q. Mr. Clark, however, prepared that with information from you? A. Yes.

Q. Will you explain to the Court then why on your return the decedent's one-half interest in these 20 United States Defense Bonds was recorded at a thousand dollars?

A. Well, I left it right to them. If it wasn't right, that is the only way I could do, just like I turned it over to them.

Q. Did you show them the bonds? A. Yes.

Q. Do you still have the bonds?

A. I don't know whether I have them now or not. I guess. I don't know. I don't know whether I have them or not. [102]

Q. I call your attention to Schedule E on this estate tax return. A. Yes.

Q. And specifically to the item No. 1. By what name have you referred to this first item during your testimony on direct examination?

A. You mean now or when?

Q. When your own counsel was asking you questions.

A. Before I was married, you mean? Mrs. J. H. Heidt.

Q. No, this Item 1 on this schedule that I laid before you. That is a piece of property that was sold for cash subsequent to your husband's death.

A. Yes.

Q. For a price of \$30,000.00. What property is that?

A. Let me see. You mean it was sold while he was alive?

(Testimony of Louise Seeley.)

Q. No.

A. I should not have caused all this trouble.

Q. The first item on this schedule.

A. Yes.

Q. Is described as a portion of the southwest quarter of Section 14, Township 2 North, Range 16 West, Ranch Ex Mission de San Fernando, described as follows:

A. That must have been that North Ridge place.

Q. The North Ridge place? [103]

A. Isn't it?

Q. Did you sell the North Ridge place?

A. Yes, after he passed away.

Q. Do you know how much you sold it for?

A. \$28,000.00. Have you got it on here?

Q. Well, this was sold for \$30,000.00. Would that be the same property?

A. What would be the same?

Q. This first item that I just called your attention to that you said is the North Ridge property.

A. It must have been sold for 30,000, it says 28,000, it must have been because we made it 30,000 because I only got 28,000 because I was paying it back with interest, see what I mean? We bought it and paid so much down, of course. I guess the interest amount to since that time to thirty.

Q. So your recollection is then that you sold it for 28,000, but the difference between 28,000 and 30,000 as reported on this report—

A. That must be the interest.

(Testimony of Louise Seeley.)

Q. Must be the interest you paid on the sale?

A. Yes.

Q. When did you acquire this North Ridge property? [104]

A. Just about two years before Mr. Heidt passed away.

Q. When you acquired it, was the title to the property taken in your name and his name jointly?

A. Well, I couldn't tell you. I don't know.

Q. Who made the deal?

A. Mr. Coaley of North Ridge, Mr. Coaley, the real estate man.

Q. Was your husband present? A. Yes.

Q. How did you acquire this property? How much did you pay for it?

A. I think it is twenty-eight or something like that.

Q. Are you confusing the twenty-eight that you paid for it with the twenty-eight that you sold it for? Did you make any money or lose any money on it?

A. I didn't make anything on it. I sold it off right off, because Mr. Heidt passed away. I just sacrificed it.

Q. Your recollection is then that you paid more for it than you sold it for? A. Yes, yes.

Q. Do you remember what you paid for it?

A. Around twenty-eight or thirty, something like that. Doesn't the deed show how much it was or something you can find out here?

Q. I haven't seen any deed. When this was purchased, [105] did you pay cash for it?

A. Yes.

Q. Or did you trade something else in for it?

A. No, Mr. Heidt he bought it cash, and I sold the land at Palm Springs out for two thousand. That is money borrowed privately.

Q. Let me make sure I understand that. When Mr. Heidt bought the North Ridge property——

A. He borrowed from a friend and paid cash.

Q. He borrowed from a friend and paid cash?

A. Yes.

Q. You are pretty sure about that?

A. Yes, I am.

Q. For the whole amount?

A. Yes, but he had borrowed from somebody else to pay the cash, then I sacrificed the land at Palm Springs and gave it to him to give to that man.

Q. This Palm Springs property that you speak of, was that in your name and Mr. Heidt's name jointly? A. No that, was my own.

Q. Where did you get that?

A. We built it, I bought and built. We bought the land and I built a place on there.

Q. You say we bought the lot. What do you mean by that? [106]

A. I mean I bought the lot and then I built on it. They had a little house on it and then I built two houses on afterwards.

Q. When was that?

A. That was in 1940, I think, 1939. I guess 1939.

(Testimony of Louise Seeley.)

Q. Do you remember how much you paid for that Palm Springs property?

A. No. I can find out from a friend of mine. I don't remember what it was.

Q. Did you trade any property in for it?

A. No, I just bought that little house with two lots.

Q. Paid cash for it?

A. Yes. I don't think it was any more than about forty-five hundred, something like that. I am not sure, though.

Q. You don't know how much you paid for it?

A. No. It was four years ago.

Q. But you did pay cash? A. Yes.

Q. Was that cash that you paid derived from the sale of some other property? A. Yes.

Q. What property was that?

A. Well, from different property we sold. I just put together and bought the lot. [107]

Q. From different properties that you and your husband sold? A. Yes.

Q. Coming to the next item on this Schedule E, described as Lots 53 and 54 of the Tract numbered 4464, City of Los Angeles, California, as per map recorded in Book 48, page 51 of Maps in the Office of the County Recorder of Los Angeles County, State of California, does that mean anything to you? A. No.

Q. Well, maybe this will help you. It was sold apparently after your husband died for \$55,000.00.

A. Yes. Well, that is the Dunsmere property, that is the only way I can remember the cash is—

(Testimony of Louise Seeley.)

Q. Well, I don't know that it says cash. It says for a price of fifty-five thousand.

A. Part of that I know.

Q. That is the Dunsmere property?

A. Yes, that is the Dunsmere property.

Q. When was that acquired?

A. That was acquired about 12 years or 10 years ago.

Q. About 10 or 12 years before 1942?

A. Yes.

Q. How was it acquired?

A. Well, just in different trades we made in making money in changing and trading. That is the only way I can [108] explain those things.

Q. Did you trade something in on it?

A. No, he bought it for cash, I think.

Q. You think he did? A. Yes.

Q. Now, referring to Item No. 3, which is described as two lots, 24 and 25 in Sunset Park Tract. A. Yes, I got two places there.

Q. What is the description that you have used in referring to those pieces of property? Is that the Sunset Park property, or does it have some other name?

A. No, it is Sunset place, two places, one five-room and the other is four-room.

Q. Sunset Place. When did you acquire that?

A. That is about 15 years ago or more.

Q. 15 years before your husband's death?

A. Oh, yes.

(Testimony of Louise Seeley.)

Q. Did he pay cash for it?

A. Well, I think I paid some and he paid on the other one.

Q. Do you know how much each one of you paid?

A. Oh, no. I think it seems to me it was fifteen thousand on one of them. I don't know what he paid for the other one.

Q. He paid for one? [109]

A. Yes, and I paid for the other.

Q. And you paid for the other one?

A. Yes, with my money.

Q. Do you know how much you paid for yours?

A. Fifteen, I think it was.

Q. Fifteen thousand? A. Yes.

Q. Do you know how much he paid for his?

A. His was about that much too, I think.

Q. You don't know?

A. Oh, in that neighborhood.

Q. You paid fifteen thousand, did you not, and he bought the other half of this same property?

A. Yes. They are different properties, different estates, different properties.

Q. Were the ranches the joint property of you and your husband?

A. I believe they were. I don't know. I couldn't tell you for sure.

Q. Do you know how the ranches were acquired?

A. Well, of course the Chatsworth Ranch, he picked that out and he said, "I will take it because I think it will be right," on account of his health, you know.

(Testimony of Louise Seeley.)

Q. And he paid for it? A. Yes. [110]

Q. Now, referring to Item 4, this item is from Beverly Hills property, Lot 86, and that was sold for \$11,000.00 after your husband's death. What is your description of that in your previous testimony?

A. That is the home on El Camino.

Q. The El Camino home?

A. 237 South El Camino.

Q. Was that the home that you and your husband lived in? A. Yes, for awhile.

Q. Do you recall when that was acquired?

A. Well, Mr. Heidt took a mortgage from the bank and then I think the bank, he had a party in and wanted to get a mortgage on this house, so Mr. Heidt gave him the money for it, and he took the house. I don't know what it is, what you call it.

Q. Now, under Item 5, which is this note given to you and your husband by the Japanese.

A. Oh, yes.

Q. Is that right? A. Yes.

Q. The note was payable to you and your husband?

A. Yes, it is joint tenants, I think.

Q. And that note was in payment for some property?

A. That is that hotel on Ruth Avenue, that is that [111] hotel that the Jap had.

Q. That is the Elmo Hotel. A. Yes.

Q. You and your husband sold the Elmo Hotel?

A. Yes.

(Testimony of Louise Seeley.)

Q. Is that true? And the other stock that was held, such as a thousand shares of Hermosa Mining Company.

A. I guess that is all the one I had. That is the same thing there.

Q. In other words, everything that was in your own name was not included in the gross estate?

A. No.

Q. And all of those things which were in your joint names are included in the gross estate, is that right? [114]

A. I don't know enough about this, everything was to be made the right way, the way it should be, because Mr.—I am not sure.

Q. Do you own 150 units of the Hamilton Oil Syndicate?

A. Yes, that is a long time ago. I don't remember much about that. He paid for that.

Q. Was that in your own name?

A. I don't know. I couldn't tell you whether that was or not. He got that. I have got those papers at home for everything.

Q. Do you still own those units?

A. I think I have it, yes.

Q. You still have that, do you?

A. I got nothing out of it. They have it here priced \$150.00. He said maybe it could be good for something, but you have to follow that in the paper, so that is the way.

Q. What can you tell us about the Trust No. 1629, Citizens Trust & Savings Bank. Do you still own any interest in that?

(Testimony of Louise Seeley.)

A. I don't know what to make of that.

Q. There is an item of \$4,000.00 on deposit at the California Bank at 9941 Wilshire Boulevard. In whose name was that account held?

A. Well, that was a joint account but I can't find the book, I don't know where it is. I asked them about it and [115] they said they didn't have it in there.

Q. Was that also joint property? A. Yes.

Q. There are two accounts listed on the estate tax return. A. Yes.

Q. One of them was the \$21,951.37 account with the Bank of America. A. Yes.

Q. And the other was the \$1,409.02 with the California Bank at 9441 Wilshire Boulevard. Now, I believe you have furnished the government information to the effect that there was a \$4,000.00 deposit at——

A. I can't find that. I can't find the book. Mr. Heidt left the book there to be fixed up, and I went after that and they said they didn't have it, so I can't get that book.

Q. Did you swear to a statement on the 31st day of May, 1946, which was addressed to the Technical Staff of the United States Commissioner of Internal Revenue in Los Angeles? A. I think so.

Q. In your statement did you say moneys on hand at the time of the death of my husband, to-wit, a deposit of \$21,998.87 in the Bank of America and a deposit of \$4,000.00 in the California Bank at 9941 Wilshire Boulevard, Beverly [116] Hills, and

(Testimony of Louise Seeley.)

you also referred to a deposit of \$1,409.02 in your checking account with the California Bank at 9941 Wilshire Boulevard. Do I understand from that that in those three accounts you had an item of \$1,409.02 which was in the California Bank checking account? A. Yes.

Q. Then \$4,000.00 was in some other account, is that correct?

A. That four thousand was what I think was Mr. Heidt's. I can't find the book, because I looked all over for it and I couldn't find any.

Q. The \$4,000.00 account you say was yours?

A. Yes.

Q. The other was Mr. Heidt's? A. Yes.

Q. Does that account for the fact that the \$4,000.00 account was not reported in the gross estate, but that Mr. Heidt's account of \$1,409.02 was?

A. Yes, I think everything was reported. The attorney took care of everything. He can testify that it never included anything. [117]

* * * * *

INGALL W. BULL

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Clark:

Q. State your name, please.

A. Ingall W. Bull.

(Testimony of Ingall W. Bull.)

Q. Where do you reside?

A. City of Los Angeles.

Q. You hold an official position in the County of Los Angeles? A. I do.

Q. And what is it?

A. Judge of the Superior Court.

Q. How long have you held that position?

A. Just about 10 years.

Q. Prior to that time were you attorney for one Joseph H. Heidt and Louis Heidt? A. I was.

Q. Louise Heidt being the petitioner, and Joseph H. Heidt being the decedent whose estate is involved? A. That is correct.

Q. How long had you known them?

A. I think I became attorney for Mr. and Mrs. Heidt about 1906.

Q. And during what period of time between the year 1906 when you first assumed that relationship to the time when you went upon the Superior Court bench of this county, during what portion of that time did you represent them as your lawyer?

A. Practically all of the time, I believe.

Q. And in what detail did you take care of their legal business?

A. Well, when they had lawsuits I tried them. When they made deals on real estate and contracts I usually attended to the matters for them.

Q. And was that true both in the transactions in which Mrs. Heidt engaged as well as those in which he engaged? A. That is correct.

(Testimony of Ingall W. Bull.)

Q. By reason of that relationship and your attention to their legal affairs, did you keep yourself personally informed as to the progress of their business? [119]

A. Well, I naturally was conversant with their business because I was consulted about it practically all of the time.

Q. During that time will you state to the court briefly but substantially what you observed and knew as to Mrs. Heidt's activities and business affairs?

* * * * *

The Witness: Mrs. Heidt handled all of the real estate transactions except such as pertained to the produce business, and that was—that is, Mr. Heidt was engaged primarily in the potato business, and he and Mr. Zimmerman were the largest potato dealers in Los Angeles for a great many years, and Mrs. Heidt bought and sold properties and improved properties, furnished them and sold them, and she was engaged in that business, but for purposes—not for the public, she was a real estate broker or agent.

Q. Now, what business in reality were you engaged in in connection with his business?

A. Sometimes leases to plant potatoes and onions, and being in Idaho as well as California. His principal stocks of potatoes came from Idaho.

Q. Did he during the period of your representation of him and Mrs. Heidt go broke in the business in which he was engaged?

(Testimony of Ingall W. Bull.)

A. About three times. That is a highly speculative business.

Q. Do you remember about when those occasions were?

A. It is so many years ago. I might say I destroyed my files about three years ago. I thought the statute of limitations had run on most of the business that I had attended to. But for that I would have those files, and I could tell you all about it if I had my files.

Q. From your observation it would be approximately when?

A. Well, a short time, a comparatively short time, and when I say a comparatively short time I don't mean months, I am speaking in years because from recollection I can't fix [122] the time, a comparatively short time before he retired from business, and he was retired from business, oh along in the early '30's, and then once maybe four or five or six years before that time and then earlier around maybe 1913 or '14 or '15, along in there.

Q. Now, do you know that on occasions when he did go broke his affairs were adjusted through a Board of Trade?

A. I believe it was through the Board of Trade. They were handled down there by Mr. Craig.

Q. W. G. Craig? A. Yes.

Q. Now deceased? A. Yes, he is deceased.

Q. He has been dead about how many years?

A. I can't recall just when Mr. Craig died.

(Testimony of Ingall W. Bull.)

Q. It has been more than five or six years?

A. Oh, yes, it has.

Q. During the period that you were representing Mr. and Mrs. Heidt and on occasions when titles to real property were acquired, did you have any conversations with Mr. Heidt as to his interest in the properties?

A. My recollection is that most of the moneys for those properties came from Mrs. Heidt through her individual dealings. I couldn't name any of the properties that he acquired, that she acquired and that she built and suggest a date on them. I considered her a very good business woman and Mr. Heidt took no part in the real estate dealings.

Q. And on these occasions did he ever speak to you about what Mrs. Heidt's connection with the real estate and the title was?

A. Well, Mrs. Heidt, I always considered the property Mrs. Heidt's property.

Q. Did he ever make such statements to you?

A. Yes, he did.

Q. On more than one occasion?

A. Yes, many times.

Q. In substance what did he say?

A. He said that those properties were hers, that he was engaged in a very highly speculative business, and that he wanted her to be sure that she had something to live on. I might also say about Mr. Heidt that when he would recoup his fortunes he would pay off his debts.

(Testimony of Ingall W. Bull.)

Q. Is that right?

A. Yes, regardless of any legal liability.

Mr. Clark: I am glad to have you volunteer that. You may cross-examine.

Cross-Examination

By Mr. Melville:

Q. You stated that you handled their lawsuits. I take it they had lawsuits? [124]

A. Oh, yes.

Q. What would the nature of those lawsuits be?

A. Oh, minor lawsuits. I can't say anything of any vast consequence. Sometimes it involved suits for Mr. Heidt. That was the primary thing.

Q. Suits for him you mean, where he was the plaintiff?

A. Plaintiff or defendant.

Q. He has been a defendant then?

A. Oh, yes.

Q. On a number of occasions?

A. Yes.

Q. Did he ever go through bankruptcy?

A. No, he did not.

Q. Did you state that to your knowledge Mrs. Heidt was never a real estate broker or agent?

A. Not that I recall, but bear in mind I have not been in touch with their affairs at all for 10 years.

Q. All of the real estate dealings that she had were for the Heidts, Mr. and Mrs. Heidt?

A. Yes. Of course I might, in connection with that answer I might say this, that I considered that

(Testimony of Ingall W. Bull.)

it was for her, because she was the one who speculated in real estate, and she was very successful.

Q. Now, his business, you said, was rather speculative? A. Yes, very speculative. [125]

Q. And he went broke three times?

A. Yes.

Q. What precautions did he take to protect his wife against this speculative business?

A. Giving her property, in other words——

Q. Putting the properties in her name?

A. Yes.

Q. And when he and his wife took the properties in their joint name, was that because the business at that particular time was not too speculative and he could take a chance on being a joint tenant of the property?

A. No, I don't think that. I think his intention was that his wife should have the real estate.

Q. But how would you account then, Judge, for the fact that much of the real estate was taken in their joint name?

A. Whatever they wanted was what was done. Now, as far as accounting for it, I don't know why they wanted it that way.

Q. Well, now, if he should go broke with real estate in the joint name of Mr. Heidt and Mrs. Heidt, wouldn't that real estate be subject to seizure by creditors?

A. I will have to give a little thought to that question, as to what the law was at that time. You are speaking of joint tenancy.

(Testimony of Ingall W. Bull.)

Q. I mean now in joint tenancy. [126]

A. Yes.

Q. You indicated in answer to a previous question that the reason that the property was placed in her name was to protect her against this speculative business that he was in?

A. That is correct. That was exactly it.

Q. Now, then, in a situation where the property was taken in their joint names, I am asking you whether and how could a joint tenancy protect her against this speculative business of his?

A. Well, it would not be subject to seizure until the tenancy was terminated.

Q. You mean a judgment obtained against Mr. Heidt, the judgment creditor could not levy against or in any way touch the jointly owned property?

A. Oh, yes, he could touch the interest of the judgment debtor, yes.

Q. That is what I thought.

A. Yes, certainly.

Mr. Melville: No more questions.

Mr. Clark: That is all. [127]

* * * * *

Mr. Clark: Your Honor, I am offering in evidence by reference to the original on record in Book 3409 of the Official Records of Los Angeles County at page 289 thereof a corporation grant deed from Security Trust and Savings Bank, a corporation, as grantor, to Louise Heidt, a married woman, as grantee, of that certain property described as Lot 11 in Block 4 Rossmoyne Park, as

per may recorded in book 70, page 23 of Maps in the Office of the County Recorder of this county, the date of that deed being August 9, 1924, and the deed containing the statement that the—near the end of it and not before the signature reading as follows:

“Grant deed issued by the above grantor dated July 8, 1924, whereby the above described property was deeded to Louise Heidt, a single woman, which deed was recorded on the 25 day of July, 1924, in book 4061, page 23 Official Records of Los Angeles County, the status of grantee having been erroneously expressed therein.”

Mr. Melville: Your Honor, I object to the introduction [128] of this testimony on several grounds: First, it has not been shown that this property was in the gross estate on the date of decedent's death; secondly, he has only read extracts from a recording here which runs over three pages; third, all it purports to show is that the deed was taken in the name of the surviving spouse. Of course the fact that the deed was taken in her name to protect her against the hazardous business that he was engaged in does not prove any contribution on her part to that property. The fact that I might buy some property, and have that recorded in my wife's name or my son's name does not prove that my son or my wife paid for the property, and I think this is immaterial.

The Court: What is the purpose of it?

Mr. Clark: The purpose of it, your Honor, is this: It is the testimony of the petitioner and also the testimony of Judge Bull that during the period of the marriage of these two parties she engaged in business transactions and acquired titles to property, and that insofar as any contribution to the purchase price of those properties was made from the community earnings of the parties, the husband stated to her that he was making a gift of his interest, whatever it may be because of that community interest, to his wife. We are corroborating that by showing that through that period of time there were approximately ten pieces of property that were acquired, title to which was taken in the name of this [129] petitioner.

Now she has testified that these properties were bought and were sold and the proceeds went into a revolving fund and finally went into the purchase and improvement of the properties which were on hand at the time of the death of Mr. Heidt and stood in their names as joint tenants. That shows the contribution, because if moneys which came from property which she owned went into property which was placed in the name of the two parties in joint tenancy, it constitutes a contribution by her of her own separate estate to the acquisition of those properties, and this book testimony corroborates it, and we have that evidence running through these years. In California law the presumption is that property standing in the name of a married woman in her sole and separate property. That is a presumption declared by the Code.

The Court: I will admit them for the purposes of corroboration.

Mr. Clark: We now offer in evidence by reference an original document recorded in Book 3835, Official Records of the County of Los Angeles at page 22, a grant deed from Howard A. Wilson and Georgia Baker Wilson, husband and wife, to Louise Heidt, a married woman, as her separate property, of that certain real property known as the north 6 acres of the northeast half of the northeast quarter of the southeast quarter of Section 12, Township 2 North, Range 17 West, S.B.M., in the City and County of Los Angeles, State of California, which deed bears date of October 22, 1924. [131]

We now offer by reference to the original document recorded in Book 4061 of Official Records of this county at page 23, which is a corporation grant deed from Security Trust and Savings Bank as grantor to Louise Heidt, a single woman, as grantee, and I may say, your Honor, that this is the deed that was corrected by the one first offered, so I simply offer this to complete that record.

The Court: Very well.

Mr. Melville: What is the date of that?

Mr. Clark: And the date of this deed is July 8, 1924.

We next offer by reference to the original recorded in Book 4159 at page 394 of Official Records of this county a deed from Georgia Baker Wilson and Henry A. Wilson as grantors to Louise Heidt, a married woman, as her separate property, covering the north 7 acres of the south 14 acres of the east one-half of the northeast quarter of the south-

east quarter of Section 12, Township 2 North, Range 17 S.B.M. in the City of Los Angeles, State of California, excepting a tract 7 feet wide along the east side of said 7 acres dedicated as a highway.

We next offer by reference to the original which is recorded in book 4768 of Official Records of this county at page 239 thereof an agreement executed as of the 27th day of November, 1926, between Joseph Heidt and Louise Heidt of the City of Los Angeles as lessors and one E. E. Bash of the same place as lessee. [133]

We now offer in evidence a document by reference to the recordation in Book 6042 of the Official Records of this County at page 100, being a grant deed from Gladys and Cannon Dunbar as grantor to Louise Heidt, a married woman, presumptively as her separate property as grantee, covering the real property situated in the city of Beverly Hills in this county, described as Lot 25 in block 95 of Beverly Hills Sheets 6, 7 8 and 9, as per map recorded in Book 54, pages 57 to 60, inclusive of Maps in the office of the County Recorder of this county, which document bears date June 5, 1926.

We offer in evidence by reference to the original recorded in Book 9529 at page 236 of Official Records of this county a deed bearing date January 9, 1930, from Graham F. Harris, a married man, as grantor, to Mrs. Louise Heidt as grantee, covering the real property situated in this county, known as Lot 3 in Block 3, Tract 6768 as per map of said tract in book 79, pages 9, 10 and 11 of Maps and Records of this county.

LOUISE SEELEY

resumed her testimony as follows:

Cross-Examination
(Continued)

By Mr. Melville:

Q. I hand you a document and ask you if you recognize the signature on the bottom of it.

A. Yes, sir.

Mr. Melville: With opposing counsel's permission, I will read in the record a paragraph from the application which was filed with the Commissioner of Internal Revenue in connection with the estate tax return, asking the relief from the tax lien of certain real property:

“That in addition to such real property applicant and said decedent held at the time of the death of said decedent other real and personal property and joint tenancy situated in the County of Los Angeles, State of California, to the reasonable value of about \$100,000.00; that about \$27,000.00 of said property was money on deposit in the bank of America, its branch at Wilshire and Dunsmere in Los Angeles, in Los Angeles, California, [134] and in the California Branch, its branch at 9441 Wilshire Boulevard, Beverly Hills, California: and that at the time of the death of said decedent said decedent was not indebted and your applicant was not indebted in any sum whatsoever excepting for nominal current living expenses, and your ap-

(Testimony of Louise Seeley.)

plicant has ample funds with which to pay the tax payable upon such property as soon as the same may be ascertained in accordance with law."

Q. (By Mr. Melville): Now, let me ask you, referring to this \$27,000.00 which was in these two banks in your joint names, whether that did not include this \$4,000.00 item in the California Bank?

A. No, sir, it did not.

Q. According to the estate tax return there was \$21,951.37 in the Bank of America. A. Yes.

Q. And there was \$1,409.02 in the California Bank. A. Yes.

Q. Now when you add \$4,000.00 to that, how much do you get? \$27,000.00.

A. I don't understand.

Q. What?

A. I don't understand what you mean.

Q. This is your signature, is it not?

A. Yes. [135]

Q. You swore by this statement that \$27,000.00 was correct, did you not? A. Yes.

Q. How do you reconcile the \$27,000.00 sworn to here with the total which is shown in Items 6 and 7 of your schedule attached to the estate tax return, which amounts to about \$23,000.00, unless you add the \$4,000.00, how do you arrive at that \$27,000.00?

A. Well, I sold the North Ridge Ranch and got the deposit on that, and just through paying for it, they paid a certain amount down, I don't remember

(Testimony of Louise Seeley.)

how much of an amount they paid. The California Bank would know that.

Q. I don't believe you understood my question. This statement which I read in the record about \$27,000.00 is to the effect that you had in your joint accounts at these two banks a total of \$27,000.00?

A. Yes.

Q. According to the estate tax return you only show approximately \$23,000.00 in your joint account, and yet your testimony is that the \$4,000.00 was not joint account. I am asking you to reconcile that.

A. Yes, I know.

Q. Can you do that?

A. Well, this \$4,000.00, the bank book, you know, which was the book for the four thousand, Mr. Heidt left in the bank [136] to be fixed and I haven't got it back.

Q. Can you reconcile the difference between approximately \$23,000.00 and the \$27,000.00 referred to in the application for release of the tax lien?

A. Mr. Mahoney took care of all that, in Beverly Hills, he had all charge of that.

Q. You can't reconcile that?

A. Yes. I don't know. Mr. Mahoney had charge of all the taxes and everything.

Q. Do you recall at one time owning Lot 2, Block D of——

A. Is that the Rossmoyne Tract?

Q. I don't know.

A. I don't know. I had a lot in the Rossmoyne Tract, then I had a lot in Beverly Hills on Wilshire Boulevard.

(Testimony of Louise Seeley.)

Q. Would it help you any if I told you that this was valued at \$10,000.00 at the time of your husband's death?

A. It was sold though before he died, this lot. That Wilshire Boulevard lot was sold.

Q. Well, is this lot that I have described, Lot 2, Block B of Newhall and Lapere Subdivision, is that the Wilshire property you spoke about now?

A. Would that be on Wilshire Boulevard, what you have there?

Q. I am sorry, I don't know.

A. That is the only lot I know, except the lots in [137] Rossmoyne Park. There are seven lots in the Rossmoyne Tract, and that is the only lot I can figure out. I am making so many deals you can't remember.

Q. Do you recall owning, either individually or jointly with your husband, a piece of real property described as Lot 7 Dickson & Tenney Company's Subdivision?

A. That must be the Rossmoyne Tract, seven lots.

Q. About what was that worth?

A. A few hundred dollars apiece at the time.

Q. I have information that it was worth \$5,000.00.

A. It was traded in with the Chatsworth Ranch, all those lots.

Q. In whose name did this last property stand at the time of your husband's death?

A. The North Ridge Ranch was in my name.

(Testimony of Louise Seeley.)

Q. Then in addition to the real property which is reported in the estate tax return as jointly owned property, you did own considerable real property in your own name, is that correct?

A. Yes, I did.

Q. And I believe your testimony is that you also owned considerable personal property in your own name?

A. Yes, I did.

Q. Did you own, did you or your husband own 200 shares of United Chief Oil and Gas Company stock, certificate 792? [138].

A. That is on the Sante Fe Springs, is that it?

Q. In whose name was that stock held?

A. He bought it in my name and my daughter's name.

Q. That was either in your name or your daughter's name?

A. Both of us, both my daughter and myself.

Q. You say he bought it under. What do you mean by that?

A. It was put in the name but he put it right in, I gave him permission to do so. I gave him authority to do that.

Q. You say he. You mean Mr. Heidt?

A. Yes.

Q. Is that also true of the 100 shares of Elias Creek Oil Company stock?

A. He never got money out of it, so they are laying there, just laying there, whatever they are.

Q. Whose name is that in?

A. Mine.

(Testimony of Louise Seeley.)

Mr. Melville: No more questions.

Mr. Clark: No more questions. That is all, Mrs. Heidt. [139]

* * * * *

Redirect Examination

By Mr. Clark:

Q. Mrs. Seeley, did you and your husband reside within the State of California at all times after you were married and until his death?

A. Always, right in Los Angeles.

Mr. Clark: That is all. Thank you very much.

* * * * *

The Court: Very well. Now, do you have any evidence, Mr. Melville?

Mr. Melville: Respondent rests. [141]

* * * * *

(Space for use of collector)

RECEIVED

RECEIVED

ESTATE & GIFT TAX SEC.

JUN 14 1943

Coll. of Int. Rev.
6th Dist. Cal.

THE TAX COURT OF THE U.S.
DIV. 15 DEPT.
ADMITTED IN EVIDENCE
Florida
JUN 21 1962
PETITIONER'S
EXHIBIT
RECORDS
EXHIBIT 1

PAYMENT OF TAX

(3) If the decedent died testate, a certified copy of the will



GENERAL INSTRUCTIONS—Continued

If the decedent was a nonresident alien, the following documents must be filed:

(1) If deductions are claimed, certified copies of the inventory and schedule or a certified copy of the return, as described in the preceding subparagraphs (1) and (2).

(2) If the decedent died testate, a certified copy of the will.

Other supplemental documents may be required as hereinafter explained under the instructions for the several schedules.

EXECUTION OF RETURN

This form consists of the cover sheets and 19 inside sheets numbered in consecutive order. A complete set should be used for every copy of the return required. For convenience in typing carbon copies the sets as issued may be readily separated and the corresponding sheets matched. When completed, each copy of the return to be filed must be permanently fastened together with all sheets in proper order. Any suitable type of paper fastener may be utilized for this purpose. Ordinary wire staples are recommended for the return of average size. The return must be filed in duplicate. All sheets provided, numbered 1 to XX1, must be included.

Write only on one side of each sheet of paper. If there is not sufficient space for all entries under any of the printed schedules, use additional sheets of the same size, and insert in the proper order in the return. All information required, as indicated under "General Information," must be supplied in the spaces provided. The questions asked under each schedule must be specifically answered, and if the decedent owned no property of any class specified for the schedule, the word "None" should be written across the schedule. The gross estate must be set forth under the appropriate Schedules A to I. The deductions, except amounts claimed for the specific exemptions and property previously taxed, should be shown under the appropriate Schedules J to N. The amounts deducted for the specific exemptions and property previously taxed should be shown under Schedules P and Q, or under Schedule R. If the gross estate of a resident or citizen exceeds \$100,000 the net estate for the basic tax should be computed under Schedule P. The net estate for the additional tax on the estate of a resident or citizen should be computed under Schedule Q. The net estate for a nonresident alien should be computed under Schedule R.

For every item of principal, any interest or rent accrued thereon at the date of the decedent's death and any outstanding dividends declared to stockholders of record on or before such date must be separately entered under the column headed, "Value at date of death"; and, if the optional valuation is adopted, any includible income with respect to each item of principal, as hereinafter explained, must be separately entered under the column headed "Value under option."

The items should be numbered under every schedule and a separate enumeration should be used for each schedule. The total for each schedule should be shown at the bottom of the schedule. The totals should not be carried forward from one schedule to another, but the total or totals for each schedule should be entered under the Recapitulation, Schedule O.

The information indicated by the columns headed "Subsequent valuation date" and "Value under option" should not be shown unless the executor adopts the optional valuation authorized by section 811 (j) of the Internal Revenue Code. If such optional valuation is not adopted the space in the columns headed "Subsequent valuation date" and "Value under option" may be utilized for descriptive matter, as indicated in the examples shown under the instructions for Schedules A and B. Similar information should be omitted in the space provided therefor under the Recapitulation, Schedule O, if the optional valuation is not adopted.

The computation of the tax must be shown in detail as indicated on sheet XX. If the executor determines no liability for tax, the word "None" should be shown at item 11 under "Computation of Tax."

The filing of this form will not be considered the filing of a complete return as required by the statute and the regulations issued pursuant thereto unless all the information as indicated herein is set forth.

If there is more than one executor or administrator, all must sign and swear to (or affirm) the return. The affidavit may be sworn to before any person authorized to administer oaths except the attorney or attorneys representing the taxpayers. If the officer has an official seal, such seal must be affixed.

If there is no executor or administrator appointed, qualified, and acting in the United States, every person in actual or constructive possession of any property of the decedent is constituted by the statute an executor for the purposes of the tax (section 930 (a) of the Internal Revenue Code), and is liable for the filing of the return.

If two or more persons are liable for the filing of the return, it is preferable for all to join in the filing of one complete return, but if they are unable to join in making one complete return, each is required to file a return disclosing all the information he has in the case, including the name of every person holding an interest in the property and a full description of such property. If the appointed, qualified, and acting executor or administrator is unable to make a complete return, the statute requires that every person holding an interest in the property shall, upon notice from the collector, make a return as to such interest.

The person or persons who file the return must, in every case, execute the first affidavit on sheet XX of both the original and duplicate copies. If the return is prepared by an attorney or agent for the person or persons filing this return, the second affidavit on sheet XX of both copies must also be executed, and executed only by such attorney or agent.

If the taxpayer desires to be represented by an attorney, by correspondents or otherwise, a power of attorney must be filed. For this purpose, Form 711, obtainable from any collector, may be executed.

VALUATION

Unless the executor elects otherwise at the time the return is filed, all property included in the gross estate must be valued as of the date of the decedent's death.

OPTIONAL VALUATION

If the executor elects to adopt the valuation authorized by section 811 (j) of the Internal Revenue Code, such election must be expressly indicated in the space provided under "General Information." The election cannot be exercised unless the return is filed within fifteen months after the decedent's death or within the period for filing the return as extended by the Commissioner or the collector under the authority of the law and regulations prescribed for such extensions.

In general, the object of section 811 (j) of the Internal Revenue Code is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

The executor may, by an election duly made upon this return, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within 1 year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date 1 year after the date of the decedent's death;

(3) Any property, interest, or estate which is "affected by mere lapse of time," valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date 1 year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever first occurs.

Property "distributed" is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subsections (e), (d), or (f) of section 811 of the Internal Revenue Code. (Subsections (e) and (d) pertain to certain transfers during the decedent's life and subsection (f) pertains to property passing under a general power of appointment.) Distribution may be effected by the entry of the order or decree of distribution, or if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which the subdivision refers, may be one made by the executor, or by the trustee of property included in the gross estate under subsections (e), (d), or (f) of section 811, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other disposition thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee, or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property in the case of a sale, exchange, or other disposition thereof within the 1-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other

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TABLE FOR COMPUTATION OF ESTATE TAX

(A) Net estate equaling—	(B) Net estate not exceeding—	(1) For basic estate tax		2) For additional estate tax (tentative tax— total gross basic and additional taxes) In effect prior to September 21, 1941		3) For additional estate tax (tentative tax— total gross basic and additional taxes) In effect after September 20, 1941	
		Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent	Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent	Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent
	\$5,000						
5,000	10,000	850	1		2		3
10,000	20,000	100	1	\$100	2	\$150	7
20,000	30,000	200	1	200	4	500	11
30,000	40,000	300	1	600	6	1,600	14
40,000	50,000	400	1	1,200	8	3,000	18
50,000	60,000	500	2	2,000	10	4,800	22
60,000	70,000	700	2	3,000	12	7,000	25
70,000	100,000	900	2	4,200	12	9,500	28
100,000	200,000	1,500	3	5,400	14	12,300	28
200,000	250,000	4,500	4	9,600	17	20,700	30
250,000	400,000	6,500	4	26,600	20	50,700	30
400,000	500,000	12,500	5	36,600	20	65,700	32
500,000	600,000	17,500	5	66,600	23	113,700	32
600,000	750,000	22,500	6	89,600	23	145,700	35
750,000	800,000	31,500	6	112,600	26	180,700	35
800,000	1,000,000	34,500	7	151,600	26	233,200	37
1,000,000	1,250,000	48,500	8	164,600	29	251,700	27
1,250,000	1,500,000	68,500	8	222,600	32	325,700	39
1,500,000	2,000,000	88,500	9	302,600	32	423,200	42
2,000,000	2,500,000	133,500	10	382,600	35	538,200	45
2,500,000	3,000,000	183,500	11	557,600	38	753,200	49
3,000,000	3,500,000	238,500	12	747,600	41	998,200	53
3,500,000	4,000,000	298,500	13	952,600	44	1,263,200	56
4,000,000	4,500,000	363,500	14	1,172,600	47	1,543,200	59
4,500,000	5,000,000	433,500	14	1,407,600	50	1,838,200	63
5,000,000	6,000,000	503,500	15	1,657,600	53	2,153,200	63
6,000,000	7,000,000	653,500	16	1,922,600	56	2,468,200	67
7,000,000	8,000,000	813,500	17	2,482,600	59	3,138,200	70
8,000,000	9,000,000	983,500	18	3,072,600	61	3,838,200	73
9,000,000	10,000,000	1,163,500	19	3,682,600	63	4,568,200	76
10,000,000	20,000,000	1,353,500	20	4,312,600	65	5,328,200	76
20,000,000	30,000,000	3,353,500	20	4,962,600	67	6,068,200	77
30,000,000	40,000,000	3,353,500	20	11,662,600	69	13,788,200	77
40,000,000		9,353,500	20	32,362,600	70	36,888,200	77

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(SPACE FOR USE OF BUREAU)

TAX ON RETURN OR DEFICIENCY	ASSESSMENTS				PAYMENTS		
	Amount	List 1943	Page	Line	Date	Principal	Interest
<i>Returned</i>	<i>417.05</i>	<i>Aug</i>	<i>103</i>	<i>6</i>	<i>6-14-43</i>	<i>417.05</i>	

DETERMINATION BY BUREAU

GENERAL INFORMATION

Decedent's name Joseph H. Heidt Date of death November 22, 1942
Residence (domicile) at date of death North Ridge, California
Year in which last domicile was established _____
Citizenship at date of death Californian
Place of death North Ridge, California
Cause of death and length of last illness Heart ailment

Names and addresses of decedent's physicians:
None

If decedent was confined in a hospital during his last illness, give name and address of hospital none

Date of birth Nov. 11, 1843 Place of birth Beaver Dam, Wisconsin
Business or occupation Retired
Business address _____
Married, single, separated, widowed, or divorced at date of death Married
Number of children None living

HEIRS, NEXT OF KIN, DEVISEES, AND LEGATEES
(If more than five, only the names of the five principal ones are required)

Name	Relationship	Address
<u>Louise Heidt</u>	<u>wife</u>	<u>Northridge, Calif. then</u> <u>745 S. Emerson, now</u> <u>L.A. Calif.</u>

Did decedent die testate? No
Were letters testamentary or of administration granted for this estate? No
Date granted _____
Name and location of court _____

To whom granted? (Explain if different from the person or persons filing return.) _____

Did the decedent at date of death own property in any State or country other than that of his last domicile? No
Place of ancillary probate proceedings, if any none

GENERAL INSTRUCTIONS—Continued

Disposition. The terms "distributed," "sold," "exchanged," "or otherwise disposed of," comprehend all possible ways by which property may be expended or passed from the gross estate.

The property to be valued as of 1 year after the date of decedent's death, or as of that date, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. It will be necessary in every case first to determine which property constituted the gross estate at decedent's death.

Interest accrued to the date of the decedent's death on bonds, notes, and other interest-bearing obligations constitutes property of the gross estate on the date of his death and is to be included in the optional valuation. Interest accruing between the date of the decedent's death and the subsequent valuation date of the bond, note, or other obligation in which such interest pertains does not constitute property of the gross estate at the date of the decedent's death and is to be excluded from the optional valuation. However, any part payment of principal made after the date of the decedent's death and on or before the subsequent valuation date, or any advance payment of interest for a period after the subsequent valuation date of the principal which has the effect of reducing the value of the principal obligation as of the subsequent valuation date constitutes a part of the gross estate and is to be included in the optional valuation.

Rent accrued to the date of the decedent's death on leased realty or personally constitutes property of the gross estate on the date of his death and is to be included in the optional valuation. Rent accruing between the date of the decedent's death and the subsequent valuation date of the leased property does not constitute property of the gross estate at the date of the decedent's death and is to be excluded from the optional valuation. The principle stated above with respect to interest paid in advance also applies to advance payments of rent.

Outstanding dividends which were declared to stockholders of record on or before the date of the decedent's death constitute property of the gross estate on the date of his death and are to be included in the optional valuation. Ordinary dividends declared to stockholders of record after the date of the decedent's death do not constitute property of the gross estate at the date of his death and are to be excluded from the optional valuation. However, if dividends are declared to stockholders of record after the date of the decedent's death with the effect that the shares of stock at the subsequent valuation date do not reasonably represent the same property existing at the date of the decedent's death, such dividends are to be included in the optional valuation, except to the extent that such dividends are paid from earnings of the corporation after the date of the decedent's death.

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of another other than the decedent, remainders, reversions, and other like properties, interests, or estates. The phrase, "affected by mere lapse of time," has no reference to obligations for the payment of money, whether or not interest-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

The date of valuation of any property, interest, or estate so affected is, as prescribed in subsection (j), the date of decedent's death, but with an adjustment to be made of the value then obtaining, which adjustment, while disregarding any later increase or decrease in value due solely to lapse of time, adds to or subtracts from the value at death any difference between that value and the value as of the date 1 year after decedent's death, or the applicable intermediate date, if, and to the extent that, such difference was due to a cause or causes other than lapse of time. Accordingly, in the valuation of any property, interest, or estate affected by lapse of time, the difference between its value at decedent's death and its value as of the later date must be analyzed to determine the portion of such difference attributable to other cause or causes, and that portion only is to be applied in adjusting the value as of the date of the decedent's death. For further information and examples relative to the valuation of properties, interests, or estates which are affected by mere lapse of time, see the Estate Tax Regulations.

Deductions authorized under section 812 or section 861 of the Internal Revenue Code are limited to the extent that otherwise thereof is not in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime, or the transfer was such as to require the property transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 812 (d) or 861 (e) (3) of the Internal Revenue Code, is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value 1 year after such death, or at the date of its sale or exchange. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or nonoccurrence of a contingency.

The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property.

In every case where the election is exercised, the return must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of such property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined as hereinbefore explained and in accordance with the regulations issued pursuant to subsection (j). The foregoing information must be shown under the appropriate columns of each schedule. Under the column headed "Description" a brief statement for each item must be shown explaining the status or disposition governing the subsequent valuation date, such as, "Not disposed of within year following death," "Distributed," "Sold," "Bond paid on maturity," etc. Under this same heading a description of each item of principal and includible income must be entered separately. Under the heading "Subsequent valuation date," the applicable date for each separate entry of principal and includible income must be shown. Under the heading "Value under option" the amount of the principal and the amount of includible income must be separately shown. In the case of any interest or estate, the value of which is affected by mere lapse of time such as patents, leaseholds, estates pur autre vie, or remainder interests, the value shown under the heading "Value under option" must be the adjusted value, i. e., the value as of the date of death with an adjustment reflecting any difference in its value as of the later date not due to mere lapse of time. Under the heading "Value at date of death" the amount of the principal and the amount of includible income must be entered separately.

For examples illustrating the entry of the information required under the schedules, see the reverse of sheets III and V. While the examples there shown pertain to Schedules A and B, the information required under the other schedules should be set forth in a similar manner.

All the information indicated on this form must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the 1-year period after the decedent's death must be supported by evidence. If the court issues an order of distribution during that period a certified copy of the order must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary.

PENALTIES

For penalties for failure to file return when due, keep records, and supply information, or for the preparation or presentation or the aiding or assisting in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, see the Estate Tax Regulations.

FURTHER INSTRUCTIONS

Detailed instructions pertaining to each schedule are included herein. For further information see the Estate Tax Regulations, a copy of which may be obtained from the Collector of Internal Revenue for your district.

GENERAL INFORMATION—Continued

Name and address of ancillary administrator or executor.....None

Did the decedent at the time of his death have a safe deposit box held either alone or in the joint names of himself and another?.....Yes (In joint tenancy with his wife)

If so, state location.....California Bank branch located at 9441 Wilshire Boulevard, Beverly Hills

If held jointly, give the name of the joint depositor and his relationship to the decedent.....Louise Heidt wife Edw. Louise Sealey

If the decedent had a safe deposit box at the time of his death indicate under what schedules in this return the contents are listed.....Schedule S

If any of the contents of the safe deposit box are omitted from the schedules, explain why.....valueless

Did the undersigned person or persons filing return make diligent and careful search for property of every kind known by the decedent?.....Yes

Did the same undersigned make diligent and careful search for information as to any transfers of the value of \$5.00 or more made by the decedent during his lifetime without an adequate and full consideration in money or money worth?.....Yes

Name and address of attorney representing estate, if any.....Oliver J. Hickey 448 South Hill Street, Los Angeles, California, and Oliver J. Hickey 1201 S. Santa Anita Ave

OPTIONAL VALUATION

Does the executor elect to have the gross estate of this decedent valued in accordance with values as of a date dates subsequent to the decedent's death as authorized by section 811 (j) of the Internal Revenue Code? (Answer "Yes" or "No.").....No

(Unless the answer to this question is "Yes", the property included in the gross estate must be valued as of the date of the decedent's death.)

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INSTRUCTIONS FOR SCHEDULE A

REAL ESTATE

Real estate should be so described and identified that upon investigation by an Internal Revenue officer it may be readily located for inspection and valuation. For each parcel of real estate there should be given the area and, if the parcel is improved, a short statement of the character of the improvements. For city or town property state street and number, ward, subdivision, block and lot, etc. For rural property state township, range, landmarks, etc.

If any item of real estate is subject to a mortgage, the unpaid balance of the mortgage should be shown under "Description." The full value of the property and not the equity must be extended in the value column. The amount of the mortgage should be deducted under Schedule L of this return.

Real property which the decedent has contracted to purchase should be listed in this schedule. The full value of the property and not the equity must be extended in the value column. The unpaid portion of the purchase price should be deducted under Schedule L of this return.

The value of dower, curtesy, or a statutory estate created in lieu thereof, is taxable, and no reduction on account thereof or on account of homestead or other exemptions should be made in returning the value of the real estate.

The basis for the returned values should be stated. If based upon appraisal a copy of such appraisal should either be attached to the return or retained in your files subject to inspection.

EXAMPLES SHOWING USE OF SCHEDULE A

Example where the optional valuation is not adopted; date of death, January 1, 1940

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1	House and lot, 1921 William Street N.W., Washington, D. C. (lot 6, square 481). Rent of \$900 due at end of each quarter, February 1, May 1, August 1, and November 1. Value based on appraisal, copy of which is attached.....			\$36,000
	Rent due on item 1 for quarter ending November 1, 1939, but not collected at date of death.....			900
	Rent accrued on item 1 for November and December 1939.....			900
2	House and lot, 304 Jefferson Street, Alexandria, Va. (lot 18, square 40). Rent of \$100 payable monthly. Value based on appraisal, copy of which is attached.....			12,000
	Rent due on item 2 for December 1939, but not collected at date of death.....			100

Example where the optional valuation is adopted; date of death, January 1, 1940

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1	House and lot, 1921 William Street N.W., Washington, D. C. (lot 6, square 481). Rent of \$900 due at end of each quarter, February 1, May 1, August 1, and November 1. Value based on appraisal, copy of which is attached. Not disposed of within year following death.....			\$36,000
	Rent due on item 1 for quarter ending November 1, 1939, but not collected until February 1, 1940.....	1/1/41	\$30,000	
	Rent accrued on item 1 for November and December 1939, collected on February 1, 1940.....	2/1/40	900	900
		3/1/40	900	900
2	House and lot, 304 Jefferson Street, Alexandria, Va. (lot 18, square 40). Rent of \$100 payable monthly. Value based on appraisal, copy of which is attached. Property exchanged for farm on December 1, 1940.....	12/1/40	10,000	12,000
	Rent due on item 2 for December 1939, but not collected until February 1, 1940.....	2/1/40	100	100

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GROSS ESTATE

SCHEDULE A

REAL ESTATE

(See instructions on reverse of Sheet III)

Did the decedent, at the time of his death, own any real estate in the United States? (Answer "Yes" or "No.") Yes

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	<i>Only his interest as a joint tenant in the real property shown in Schedule "E," and said interest was confirmed in the will at once upon his death.</i>		\$	\$
TOTAL (also enter under the Recapitulation, Schedule O).....			\$	\$

(If more space is needed, insert additional sheets of same size)

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INSTRUCTIONS FOR SCHEDULE B

STOCKS AND BONDS

Description.—Description of stocks should indicate number of shares, whether common or preferred, issue, par value, price per share, exact name of corporation, and, if not listed on a stock exchange, the location of the principal business office and State in which incorporated and the date of incorporation. If listed, state principal exchange upon which sold. Description of bonds should include quantity and denomination, name of obligor, kind of bond, date of maturity, interest rate, and interest-due dates. State the exchange upon which listed, or if unlisted, the principal business office of the company.

Valuation.—In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the valuation date shall be considered as the fair market value per share or bond. If there were no sales on the valuation date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. For example, assume that sales of stock nearest the valuation date (June 15) occurred 3 days before (June 13) and 3 days after (June 18) and that on such days the mean sale prices per share were \$10 and \$15, respectively. The price of \$12 shall be taken as representing the fair market value of a share of such stock as of the valuation date. If, however, on June 13 and 18 the mean sale prices per share were \$15 and \$10, respectively, the price of \$13 shall be taken as representing the fair market value of a share of such stock as of the valuation date. If the security was listed on more than one exchange, the records of the exchange where the security is principally dealt in should be employed. In valuing listed stocks and bonds the executor should observe care to consult accurate records to obtain values as of the applicable valuation date.

In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the valuation date; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing company, the executor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

If actual sales are not available during a reasonable period beginning before and ending after the valuation date, the fair market value may be determined by taking the mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. If actual sale prices or quoted bona fide bid and asked prices are available on a date within a reasonable period prior to the valuation date, but if no actual sale prices or bona fide bid and asked prices are available on a date within a reasonable period after the valuation date, or vice versa, then the mean between such highest and lowest available sale prices or bid and asked prices may be taken as the value.

Inactive stock and stock in close corporations should be valued on the basis of the company's net worth, earning and dividend-paying capacity, and all relevant factors bearing on the value of the stock. Complete financial and other data upon which the estate bases its valuation should be submitted in duplicate with the return, including balance sheets (particularly the one nearest to the valuation date), and statements of the net earnings or operating results and dividends paid for each of the 5 years immediately preceding the valuation date.

Securities returned as of no value, nominal value or obsolete, should be listed last, and the address of the company and the State and date of the incorporation should be stated. Correspondence or statements used as the basis for return of no value should be retained for inspection.

Interest and dividends.—Interest and dividends must be shown separately as explained in the general instructions under "Execution of Return."

Estate of nonresident alien.—In the case of an estate of a nonresident alien of the United States, stocks or bonds of the following classes must be included hereunder: (1) Bonds of corporations organized in the United States, regardless of the situs of the certificates; (2) stocks of foreign corporations, if the stock certificates were physically situated in the United States at the time of the decedent's death; and (3) bonds of corporations, whether domestic or foreign, if physically situated in the United States at the time of death. For example, a share of stock of a corporation organized in the United States must be included for tax in the estate of a nonresident alien even though the stock certificate was in England; and a share of stock of a corporation organized in England must be included in his estate if the stock certificate was in the United States at the time of death.

Examples.—See examples showing the use of Schedule B which are printed on the back of Sheet V.

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SCHEDULE B **STOCKS AND BONDS**

(See instructions on reverse of Sheet IV)

(1) Did the decedent, if a resident or citizen of the United States, own any stocks or bonds, regardless of situs, at the time of his death? (Answer "Yes" or "No.") **Yes**

(2) Did the decedent, if a nonresident alien of the United States, own, at the time of his death, any stocks or bonds situated in the United States as explained in the instructions? (Answer "Yes" or "No.")

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	United States Liberty Bond <i>(Joint Tenancy Interest - see Schedule E)</i>		\$	\$ 2000.00
TOTAL (also enter under the Recapitulation, Schedule O)			\$	\$

(If more space is needed, insert additional sheets of same size)

ESTATE OF Joint tenancy Joseph E. Reidt, Deceased

10-10489-1

Sheet V

INSTRUCTIONS FOR SCHEDULE B—Continued

EXAMPLES SHOWING USE OF SCHEDULE B

Example where the optional valuation is not adopted; date of death, January 1, 1940

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1	Sixty \$1,000 Arkansas Railroad Co. first mortgage 4-percent, 30-year bonds, due 1950. Interest payable quarterly on February 1, May 1, August 1, and November 1. New York Exchange at 100.....			\$60,000
	Interest coupons attached to bonds, item 1, due and payable on November 1, 1939, but not cashed at date of death.....			600
	Interest accrued on item 1, from November 1, 1939, to January 1, 1940.....			400
3	Five hundred shares Public Service Corporation, common, par \$100, at 110, ex dividend, New York Exchange.....			\$5,000
	Dividend on item 2 of \$2 per share declared December 10, 1939, payable on January 10, 1940, to holders of record on December 30, 1939.....			1,000

Example where the optional valuation is adopted; date of death, January 1, 1940

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1	Sixty \$1,000 Arkansas Railroad Co. first mortgage 4-percent, 30-year bonds, due 1950. Interest payable quarterly on February 1, May 1, August 1, and November 1. New York Exchange at 100 on date of death.....			\$60,000
	Thirty of such \$1,000 bonds distributed to legatees on August 1, 1940. New York Exchange at 90.....	8/1/40	\$29,700	
	Thirty of such \$1,000 bonds sold by executors on September 1, 1940, at 99.....	9/1/40	29,700	
	Interest coupons attached to bonds, item 1, due and payable on November 1, 1939, but not cashed at date of death. Cashed by executor on February 1, 1940.....	2/1/40	600	600
	Interest accrued on item 1 from November 1, 1939, to January 1, 1940. Cashed by executor on February 1, 1940.....	2/1/40	400	400
3	Five hundred shares Public Service Corporation, common, par \$100. New York Exchange. At 110, ex dividend, on date of death. At 90 on January 1, 1941, not disposed of within year following death.....	1/1/41	45,000	\$5,000
	Dividend on item 2 of \$2 per share declared December 10, 1939, and paid on January 10, 1940, to holders of record on December 30, 1939.....	1/10/40	1,000	1,000

SCHEDULE C **MORTGAGES, NOTES, AND CASH**

(See instructions on reverse of this sheet)

Did the decedent, at the time of his death, own any mortgages, notes, or cash? (Answer "Yes" or "No.") **Yes**

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	See joint tenancy List of Property Schedule E		\$	\$
TOTAL (also enter under the Recapitulation, Schedule O).....			\$	\$

(If more space is needed, insert additional sheets at end of return also.)

INSTRUCTIONS FOR SCHEDULE C

MORTGAGES, NOTES, AND CASH

The classes of property under this schedule should be listed separately in the order given.

Mortgages.—State (1) face value and unpaid balance, (2) date of mortgage, (3) date of maturity, (4) name of maker, (5) property mortgaged, and (6) interest dates and rate of interest. For example: Bond and mortgage for \$9,000, unpaid balance \$6,000; dated January 1, 1939, John Doe to Richard Roe; premises 22 Clinton Street, Newark, N. J., due January 1, 1942; interest payable at 6 percent per annum January 1 and July 1.

Notes, promissory.—Show similar data.

Contract by the decedent to sell land.—Show name of vendee, date of contract, description of property, sale price, initial payment,

amounts of installment payments, unpaid balance of principal and interest rate.

Cash in possession.—List separately from bank deposits.

Cash in bank.—State bank and address, amount in cash bank, serial number and nature of account, showing whether checking, savings, time deposit, etc. If statements are obtained from banks they should be retained for inspection by an Internal Revenue agent.

Estate of nonresident alien.—In the case of an estate of a non-resident alien of the United States a bank deposit is not includible in the gross estate if the decedent was not engaged in business in the United States at the time of his death. This special exemption is not applicable where the money is held in a custodian account or by the bank in the capacity of a trustee.

10-5555-1

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SCHEDULE D
INSURANCE

(Use instructions on reverse of this sheet)

(1) Was any insurance on life of decedent receivable by his estate? (Answer "Yes" or "No.")No.....

(2) Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "Yes" or "No.") No

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$
TOTAL			\$.....	\$.....
Less amount receivable by beneficiaries, other than the estate, not in excess of \$40,000			\$.....	\$.....
TOTAL INCLUDED (also enter under the Recapitalization, Schedule O)			\$.....	\$.....

(If more space is needed, insert additional sheets of same size)

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INSTRUCTIONS FOR SCHEDULE D

INSURANCE

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system.

Life insurance not includible in the gross estate under the provisions of subsection (g) of section 811 of the Internal Revenue Code and the estate tax regulations pertaining thereto may, depending upon the facts of the particular case, be includible under some other subsection of section 811 and the applicable regulations, such as subsection (c) in the case of insurance "taken out" by the decedent on or prior to the date of Treasury Decision 5032 and also transferred by him on or prior to such date in contemplation of death.

INSURANCE IN FAVOR OF THE ESTATE

The full amount of the proceeds of insurance on the life of the decedent receivable by the executor or administrator, or otherwise payable to or for the benefit of the estate, should be included in the gross estate. Insurance in favor of the estate includes insurance effected to provide funds to meet the estate tax, and any other taxes, debts, or charges which are enforceable against the estate. The manner in which the policy is drawn is immaterial so long as there is an obligation, legally binding upon the beneficiary, to use the proceeds in payment of such taxes, debts, or charges. The full amount is so includible even though the premiums or other consideration wherewith the insurance was acquired may have been paid by a person other than the decedent. The special insurance exemption of \$40,000 is not applicable against the proceeds of insurance in favor of the estate.

INSURANCE RECEIVABLE BY BENEFICIARIES OTHER THAN THE ESTATE

Insurance taken out by the decedent on his own life and receivable by beneficiaries other than the estate is includible in the gross estate as hereinafter set forth.

Insurance receivable by beneficiaries other than the estate is considered to have been "taken out" by the decedent where he paid, either directly or indirectly, all the premiums or other consideration wherewith the insurance was acquired, whether or not he made the application. Such insurance is not considered to have been so "taken out," even though the application was made by the decedent, if no part of the premiums or other consideration was paid either directly or indirectly by him. Where a portion of the premiums or other consideration was actually paid by another and the remaining portion by the decedent, either directly or indirectly, such insurance is considered to have been "taken out" by the latter in the proportion that the payments therefor made by him bear to the total amount paid for the insurance.

Legal incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possessed a legal incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him. Decedent dying on or before January 10, 1941.—In case the decedent died on or before January 10, 1941, the date of Treasury Decision 5032, the amount in excess of \$40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate to the extent to which such insurance was taken out (purchased or premiums paid) by the decedent and with respect to which the decedent possessed any of the legal incidents of ownership at the time of his death.

Decedent dying after January 10, 1941.—In case the decedent died after January 10, 1941, the date of Treasury Decision 5032, the amount in excess of \$40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate as follows:

(1) To the extent to which such insurance was "taken out" (purchased or premiums paid) by the decedent on or before January 10, 1941, and with respect to which the decedent possessed any of the legal incidents of ownership at any time after such date, and

(2) To the extent to which such insurance was "taken out" (purchased or premiums paid) by the decedent after January 10, 1941, regardless of whether he possessed any of the legal incidents of ownership therein at any time.

The estate is entitled to only one exemption of \$40,000 upon insurance receivable by beneficiaries other than the estate. For instance, if the decedent left life insurance otherwise includible in the gross estate and payable to three such beneficiaries in amounts of \$10,000, \$40,000, and \$50,000 (total, \$100,000), the full amount should be listed in the schedule and therefrom subtracted the \$40,000 exemption in the space provided thereon. The word "beneficiaries," as used in reference to this \$40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Example: Insurance on the life of the decedent who died after January 10, 1941, the date of Treasury Decision 5032, totaled \$200,000. It was payable to his son as beneficiary and the decedent never possessed any of the legal incidents of ownership therein. Premiums aggregating \$100,000 were paid for the insurance, of which the decedent paid \$50,000 before the date of Treasury Decision 5032 and \$50,000 after that date. The remaining premiums of \$50,000 were paid by the decedent after the date of the Treasury decision is the proportion of \$200,000 that the amount of the premiums paid by him after such date, \$50,000, bears to the total amount of the premiums paid for the insurance, \$100,000. Such proportion is three-tenths of \$200,000, or \$60,000. As the decedent possessed none of the legal incidents of ownership in the insurance at any time after the date of the Treasury decision, \$100,000 of the insurance, the extent to which it was "taken out" by the decedent before such date ($\frac{50,000}{100,000} \times \$200,000$), is excluded from the gross estate. The amount of \$40,000, the extent to which the insurance was not "taken out" by the decedent ($\frac{20,000}{100,000} \times \$200,000$), is also excluded from the gross estate. The amount of the insurance "taken out" by the decedent after the date of the Treasury decision, \$60,000, is reduced by \$40,000, the special insurance exemption, and the amount of the insurance included in the gross estate is \$20,000.

EXECUTION OF SCHEDULE

Insurance payable to the estate should be listed first and the full amount entered in the fourth or fifth column. Immediately following should be disclosed under the second column headed "Description," all insurance payable to beneficiaries other than the estate whether or not the executor believes the insurance is includible before deduction of the special insurance exemption of \$40,000. If the executor determines that the full amount of the proceeds of any policy payable to beneficiaries other than the estate is includible, before deduction of the insurance exemption, the full amount should also be entered in the fourth or fifth column. If the executor determines with respect to any policy that the entire proceeds are not so includible in accordance with instructions above, and enters no amount or an amount less than the full proceeds, a complete explanation of his determination, including a computation of the amount included, if any, should be submitted either on the schedule or in a separate statement attached. A photostatic copy of any such policy should also be filed with the return.

Deduction may be taken in the space provided near the bottom of the schedule equal to the amount of the proceeds of insurance receivable by beneficiaries other than the estate and included in the fourth or fifth column, but not exceeding \$40,000. In describing a policy, state name of company, number of policy, and name of beneficiary.

The "Life Insurance Statement," Form 712, for each policy listed in the schedule should be obtained from the insurance company by the executor and filed with the return.

ESTATE OF NONRESIDENT ALIEN

In the case of an estate of a nonresident alien of the United States, the proceeds of insurance on his life need not be included.

COMMISSIONER OF INTERNAL REVENUE
TREASURY DEPARTMENT
WASHINGTON, D. C.

AFFIDAVIT OF LOUISE HEIDT SEELEY, FORMERLY
LOUISE HEIDT, IN RE HER CONTRIBUTION TO
PROPERTIES HELD IN JOINT TENANCY.

STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES. } SS.

LOUISE HEIDT SEELEY (formerly Louise Heidt), being first
duly sworn, deposes and says:

That she is the widow of Joseph H. Heidt who died on
November 22, 1942 at North Ridge in Los Angeles County, California,
and that the facts herein stated are known to her.

That the properties, both real and personal, set forth in
the Estate Tax Return to which this affidavit is attached, except-
ing Lot 24 of Sunset Park Tract in the City of Los Angeles, being
a part of subdivision 3 of Schedule E hereof, and excepting the
property described in subdivision 5 of Schedule E hereof, were
acquired by affiant and said decedent subsequent to January 1, 1928
and that the full considerations paid therefor, or from which said
properties resulted, consisted of the separate estate of affiant
and of the community property of affiant and said decedent. That
said Lot 24 of said Sunset Park Tract, was acquired by said decedent
and affiant during the month of December 1920, as joint tenants,
and that more than one-half of the cost thereof was contributed by
affiant from her own separate property. That said property des-
cribed in subdivision 5 of said Schedule E was acquired during the
month of October 1906 by affiant, as her sole and separate property
and as her separate estate, and that said property remained her sole
and separate estate until it was sold and a trust deed was taken in

ESTATE TAX RETURN
JUN 14 1943
Coll. of Int. Rev.
6th Dist. Cal.

the name of said decedent and affiant as joint tenants, as set forth in subdivision 5 of said Schedule E.

That more than one-half of the total consideration paid for said properties, and from which said properties resulted, was contributed by affiant from her separate estate and from her one-half interest in the accumulations of the community earnings after December 31, 1927 of said decedent and affiant, within the State of California. That by reason of affiant's contributions to the acquisition of said properties as aforesaid, the gross estate reportable for the purpose of determination and payment of the federal tax is as follows:

Parcel 1 ($\frac{1}{2}$ of \$30,000)	\$ 15,000.00
Parcel 2 ($\frac{1}{2}$ of \$55,000)	27,500.00
Parcel 3 ($\frac{1}{2}$ of \$18,000)	9,000.00
Parcel 4 ($\frac{1}{2}$ of \$11,000)	5,500.00
Parcel 5 (affiant contributed all of the purchase price from her separate estate)	- - -
Parcel 6 ($\frac{1}{2}$ of \$21,951.37)	10,975.58
Parcel 7 ($\frac{1}{2}$ of \$1,409.02)	704.51
Parcel 8 ($\frac{1}{2}$ of \$2,000)	<u>1,000.00</u>
	\$ 69,680.09

DATED: June 10th, 1943.

Laura Kadi O'Leary

Subscribed and sworn to before me

(this 10th day of June, 1943.

David L. Lally

Notary Public in and for said
County and State.

SCHEDULE I

1.

That portion of the southwest quarter of section 14, Township Two (2) North, Range Sixteen (16) West Rancho Ex-Mission de San Fernando, described as follows:

Beginning at a point in the west line of said Southwest Quarter of Section Fourteen (14) at the intersection of said West line of said Southwest Quarter of section fourteen (14) at the intersection of said West line with a line parallel with the distant Northerly Nineteen Hundred Eighty Feet (1980) at Right Angles from the North Line of Lassen Street, Thirty Feet (30) wide; thence North along said West Line Six Hundred and Sixty feet (660), more or less, to the Northwest corner of said Southwest Quarter of Section Fourteen (14); thence East along the North line of said Southwest Quarter of Section 14, a distance of Seven Hundred Ninety-two (792) feet; thence South parallel with said West line, 660 feet, more or less, to the intersection with the aforementioned parallel line distant 1980 feet northerly from the North line of Lassen Street; thence West along said last mentioned parallel line 792 feet to the point of beginning, wherein David C. Brown conveyed said above real property to J. H. Heidt sometimes known as Joseph H. Heidt and to Louise Heidt, as joint tenants, which deed was recorded in Book 18479, at Page 222, on the 19th day of June, 1941, in the office of the County Recorder of Los Angeles County, California.

This property has been sold for cash since November 22, 1942, at the price of \$30,000.00. *Decedent's one-half interest \$15,000.00*

2.

Lots Fifty-three (53) and Fifty-four (54) of Tract Numbered 4464, City of Los Angeles, California, as per Map recorded in Book 48, Page 51 of Maps in the office of the County Recorder of Los Angeles, State of California.

This property has been sold for cash since November 22, 1942, at the price of \$55,000.00. *Decedent's one-half interest \$27,500.00*

3.

Lots Twenty-four (24) and Twenty-five (25) of Sunset Park Tract in the City of Los Angeles, County of Los Angeles, State of California, as per Map recorded in Book 6, Page 69, in the office of the County Recorder of Los Angeles County, State of California.

This property has been sold for cash since November 22, 1942, at the price of \$18,000.00. *Decedent's one-half interest \$9,000.00*

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4.

Lot Eighty-six (86), Tract 7710, Beverly Hills, as per Book 83, Pages 94 and 95 of Maps, Records of County of Los Angeles, State of California.

This property has been sold for cash since November 22, 1942, at the price of \$11,000.00. *decident's one-half interest \$5,500.00*

5.

Promissory note given by Michi Kusahaya, a maker, for the sum of \$16,000.00 given at Beverly Hills, California, on October 14, 1936, payable to Joseph H. Heidt and Louise Heidt as joint tenants the beneficiaries, and secured by a trust deed recorded in Book 14598, Page 69 of Official Records of Los Angeles County, California, on lands described as Southwest 12.5 feet of Lot 39 and all of Lot 40 in Block 24 of Wolfskill Orchard Tract, City of Los Angeles as per Map recorded in Book 30, Pages 9 to 13 of Miscellaneous Records and the California Trust Company appears as trustee upon which there is a balance due of \$7,262.05. *(decident furnished nothing toward the acquisition of this item)*

6.

Monies held in the Bank of America, held in joint tenancy, in the names of Joseph H. Heidt and Louise Heidt, on November 22, 1942, in the sum of \$21,951.37
Bank of America Branch located at Wilshire and Dunsmuir,
Los Angeles, California. *decident's one-half interest \$10,975.58*

7.

Monies in a Checking Account in the California Bank, Branch located at 9441 Wilshire Boulevard, Beverly Hills, California, held in joint tenancy in the names of Joseph H. Heidt and Louise Heidt, on November 22, 1942, in the sum of \$1,409.00
decident's one-half interest \$704.51

8.

20 (Twenty) United States Defense Bonds of par value of . \$2,000.00
decident's one-half interest \$1,000.00

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SCHEDULE E
JOINTLY OWNED PROPERTY

(See instructions on reverse of this sheet)

(1) Did the decedent, at the time of his death, own any property as a joint tenant or as a tenant by the entireties with right of survivorship? (Answer "Yes" or "No.") Yes

(2) If so, state the name and address of each surviving cotenant.

Louise Heidt now Louise Sealey

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$
TOTAL (also enter under the Recapitulation, Schedule O)			\$	\$

(If more space is needed, insert additional sheets of same size)

INSTRUCTIONS FOR SCHEDULE E

JOINTLY OWNED PROPERTY

All property of whatever kind or character, whether real estate, personal property, bank accounts, etc., in which the decedent held at the time of his death an interest either as a joint tenant or as a tenant by the entirety, with right of survivorship, must be disclosed under this schedule.

The full value of the property must be included in the gross estate, unless it can be shown that a part of the property originally belonged to the other tenant or tenants and was never received or acquired by the other tenant or tenants from the decedent for less than an adequate and full consideration in money or money's worth. Where it is shown that the property or any part thereof, or any part of the consideration with which the property was purchased, was acquired by the other tenant or tenants from the decedent for less than an adequate and full consideration in money or money's worth, there should be omitted only so much of the value of the property as is proportionate to the consideration furnished by such other tenant or tenants. For the purposes of the estate tax, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

Where the property was acquired by gift, bequest, devise, or inheritance by the decedent and spouse as tenants by the entirety, then only one-half of the value of the property should be included. Where the property was acquired by the decedent and another

person or persons by gift, bequest, devise, or inheritance as tenants, and their interests are not otherwise specified or fixed by law, then there should be included only such fractional part of the value of the property as is obtained by dividing the full value of the property by the number of joint tenants.

If the executor contends that less than the value of the property is includible in the gross estate for purposes of the estate tax, the burden is upon him to show his right to include such less value, and in such case he should make proof of the extent, character, and nature of the decedent's interest and the interest of the decedent's cotenant or cotenants.

In every instance a statement under the column headed "Description" must disclose whether the whole or only a part of the property is included in the gross estate. If only a part of the property is included in the gross estate, the fair market value of the whole must be shown under "Description."

Property in which the decedent held an interest as a tenant in common should not be listed under this schedule, but the value of his interest therein should be returned under Schedule A, if real estate, or if personal property, under such other appropriate schedule. The decedent's interest in a partnership should not be included under this schedule, but should be shown under Schedule "Other miscellaneous property."

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SCHEDULE F
OTHER MISCELLANEOUS PROPERTY

(See instructions on reverse of this sheet)

(1) Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business?
(Answer "Yes" or "No.") No

(2) Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" or "No.")

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$
Total (also enter under the Recapturization Schedule D)			\$	\$

TOTAL (also enter under the Recapitulation, Schedule O)

If more space is needed, insert additional sheets of same size.

Source of Joint tenancy Joseph E. Heidt, Deceased

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Summary

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INSTRUCTIONS FOR SCHEDULE F
OTHER MISCELLANEOUS PROPERTY

Under this schedule list all items of the gross estate not returnable under any other schedule, such as the following: Debts due the decedent; interests in business; claims; rights; royalties; pensions; households; judgments; shares in trust funds; household goods and personal effects, including wearing apparel; farm products and growing crops; livestock; farm machinery; automobiles; etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statements of assets and liabilities as of the valuation date and for the 5 years preceding, and statements of the net earnings for the same 5 years. Good will must be accounted for. In general, the same information should be fur-

nished and the same methods followed as in valuing close corporations.

In case of an interest in a trust fund, duplicate copies of the trust instrument should be submitted.

In describing an annuity, the name and address of the grantor of the annuity should be given, or if payable out of a trust or other fund, such a description as will fully identify it. If payable for a term of years, the duration of the term and the date on which it began should be given, and if payable for the life of a person other than the decedent, the date of birth of such person should be stated.

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(See instructions on reverse of this sheet)

(4) If the answer to question (3) is "Yes" state date, amount or value, character of transfer, and motive which actuated the decedent in making the transfer:

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$

(If more space is needed, insert additional sheets of same size.)

INSTRUCTIONS FOR SCHEDULE G

TRANSFERS DURING DECEDENT'S LIFE

In accordance with the provisions of subsections (c) and (d) of section 811 of the Internal Revenue Code, the following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax, and must be included in the gross estate under this schedule.

(1) Transfers made after September 8, 1916, in contemplation of death.

(2) Transfers intended to take effect in possession or enjoyment at or after the decedent's death, or transfers contingent upon the decedent's death, i. e., where the decedent's death is a necessary condition to effect an indefeasible transfer of the property from him or his estate. For certain exceptions with respect to such transfers, see the Estate Tax Regulations.

(3) Transfers made after 10:30 p. m., eastern standard time, March 3, 1931, whereby the decedent retained the use, possession, right to the income, or other enjoyment of the transferred property for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or except with respect to transfers made before 5 p. m., eastern standard time, June 6, 1932, for any period not ascertainable without reference to his death.

(4) Transfers (not otherwise includible) whereby the decedent retained the right to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof, as follows:

(a) In case the transfer was made after 10:30 p. m., eastern standard time, March 3, 1931, and the right to so designate was retained by the decedent alone, for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or

(b) In case the transfer was made after 5 p. m., eastern standard time, June 6, 1932, and the right to so designate was retained by the decedent alone or in conjunction with any other person or persons, for decedent's life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for any period not ascertainable without reference to his death.

(5) Transfers whereby the enjoyment of the transferred property was subject at decedent's death to any change through the exercise of a power to alter, amend, revoke, or terminate, as follows:

(a) In case the transfer was made before 4:01 p. m., eastern standard time, June 2, 1924, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person having no substantial adverse interest in the transferred property,

(b) In case the transfer was made after 4:01 p. m., eastern standard time, June 2, 1924, and before June 28, 1936, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with any person (regardless of whether such person had a substantial adverse interest in the transferred property), or

(c) In case the transfer was made after June 22, 1936, regardless of whether the power was reserved at the time of the transfer or later created or conferred, and without regard to the source from which the power was acquired, regardless of whether the power was exercisable by the decedent alone or in conjunction with any person, and if in conjunction with any person, regardless of whether such person had a substantial adverse interest in the transferred property.

(6) Transfers effected after September 8, 1916, by the relinquishment in contemplation of death of his power to alter, amend, revoke, or terminate a transfer of property previously made by the decedent under conditions set forth in the preceding subparagraph (b).

For more detailed information, see the Estate Tax Regulations.

Transfers included in the gross estate should be valued as of the date of the decedent's death or, if the optional valuation is adopted, in accordance with subsection 811 (j) of the Internal Revenue Code. If only a portion of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the value of the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at the valuation date, due to such additions or betterments, should not be included. However, the value of the whole must be disclosed under the column headed "Description," together with an explanation of the proportionate inclusion.

To constitute a bona fide sale for an adequate and full consideration in money or money's worth, it must have been made in good faith, and the price must have been an adequate and full equivalent and reducible to a money value. If the price was less than an adequate and full equivalent, only the excess of the fair market value of the property, as of the valuation date, over the price received by the decedent should be included in the gross estate. For the purpose of the estate tax the relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

All transfers made by the decedent during his life of an amount of \$5,000 or more except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a statement of the pertinent facts should be made. In case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof must be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. If the decedent was a non-resident, only one copy need be filed, certified or verified, as the case may be.

The name of the transferee, date and form of transfer, and a complete description of the property should be set forth in this schedule. Rents and other income must be included as explained under "Execution of Return" in the general instructions.

Nonresident alien.—If the decedent was a nonresident alien the transfer must be included if the property was situated in the United States, either at the date of the decedent's death or at the date of the transfer.

SCHEDULE H
POWERS OF APPOINTMENT

(See instructions on reverse of this sheet)

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No.") No

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$

TOTAL (also enter under the Recapitulation, Schedule O).....

\$

\$

(If more space is needed, insert additional sheets of same size)

INSTRUCTIONS FOR SCHEDULE H

POWERS OF APPOINTMENT

In accordance with subsection (f) of section 811 of the Internal Revenue Code, property passing under a general power of appointment must be included in the gross estate under this schedule if exercised by the decedent (A) by will, or (B) by deed resulting in any of the transfers described in subparagraphs (1), (2), (3), and (4) of the first paragraph of the instructions for Schedule G; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

If the power is exercised for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there should be included in the gross estate only the excess of the fair market value, at the applicable valuation date, of the property passing under the power over the value of the consideration received by the decedent.

Only property passing under a general power should be included. A general power is one to appoint to any person or persons in the discretion of the donee (or appointor) of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, if it is exercisable in favor of the donee, his estate, or his creditors.

Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with the return, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required. The copies must be filed even though it is contended that the power was a limited one and the property passing thereunder is not returned for tax.

INSTRUCTIONS FOR SCHEDULE I

PROPERTY PREVIOUSLY TAXED

Property includible in the gross estate that was received from a person who died within 5 years prior to the decedent's death or received by gift within 5 years prior to the decedent's death, or acquired in exchange therefor, with respect to which a deduction is authorized because an estate tax was paid by the prior estate or a gift tax was paid by the donor, should be returned in this schedule. The deduction for such property is authorized under the provisions of section 812 (c) or section 661 (a) (2) of the Internal Revenue Code, in accordance with the following conditions and limitations:

(a) Conditions:

(1) The property must have been received by the decedent by gift, bequest, devise, or inheritance from a prior decedent who died within 5 years of the decedent's death, or received by him as a gift within 5 years of his death.

(2) The property must be identified either as the same which the decedent so received or as property acquired in exchange therefor.

(3) The property so received must have formed a part of the gross estate situated in the United States of such prior decedent, or have been included in the total amount of gifts of the donor.

(4) An estate tax by or on behalf of the estate of such prior decedent, or a gift tax by or on behalf of the donor, must have actually been paid (the mere filing of a return for such estate or donor not being sufficient).

(5) No such deduction, in respect to the property or property exchanged therefor, must have been allowable in determining the value of the net estate of the prior decedent.

(b) Limitations—

(1) The deduction is limited to the aggregate value of the property as finally determined in the case of the prior decedent or donor, or to the aggregate value of such property included in the value of the gross estate of the prior decedent, whichever is lower.

(2) The deduction, as limited in (1), is reduced by the total amount paid prior to the decedent's death on any mortgage or other lien on the property previously taxed, provided such mortgage or other lien was deducted in determining the estate tax of the prior decedent or the gift tax of the donor.

(3) The deduction is further reduced by the proportion of the total other deductions (allowable under Schedules J, K, L, M, and N, and the specific exemption if applicable) which the amount otherwise deductible for property previously taxed bears to the amount of the gross estate.

The value of each item of property and any income thereon determined as of the applicable date or dates for inclusion in the value of the gross estate of the present decedent should be entered under the appropriate columns A, B, C, and D. It will be noted that column A is provided for the value under the option of the principal of each item of property and column B for any income thereon under the option, and that column C is provided for the value at the date of the decedent's death of the principal of each item of property, and column D is provided for any income thereon accrued to the date of death. The value finally determined in the prior estate or gift of each item of property should be entered in column E.

The description should show the schedule and item number of the property as it appeared in the prior return. To make it clear that the schedule and item number relate to the prior return, they should be included in parentheses. If only a portion of an item in the prior estate is reflected in the present estate, that fact should be indicated and only a proportionate part of the value of the item in the prior estate, as finally determined, should be entered in column E.

In accordance with the foregoing second limitation, any amount paid before the death of the present decedent in discharge of a mortgage or other lien on the property previously taxed, provided such mortgage or other lien was deducted in the prior case, should be shown last under the column headed "Description," together with an identification of the item of property involved and the item deducted in the prior case. The total of such amounts paid should be entered at item (b).

It will be noted that the "Total included in gross estate" (included in the value of the gross estate utilized for the computation of the tax) is the total of columns A and B if the optional valuation is adopted, or the total of columns C and D if the optional valuation is not adopted. However, if the optional valuation is adopted, both such totals should be entered under the appropriate columns under the Recapitulation, Schedule O.

The amount of the gross deduction for property previously taxed, in accordance with the first limitation, is entered at item (a). If the optional valuation is adopted, the amount of the gross deduction is the total of column A or the total of column E, whichever is the lower. If the optional valuation is not adopted, the amount of the gross deduction is the total of column C or the total of column E, whichever is the lower. The amount of item (b) is subtracted from the amount of item (a); and the difference, which is entered at item (c), is the amount of the deduction as reduced in accordance with the second limitation. The amount of the net deduction for property previously taxed, as reduced by a certain proportion of the total other deductions in accordance with the third limitation, is finally computed under Schedules P and Q or under Schedule R.

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DEDUCTIONS
SCHEDULE J
FUNERAL AND ADMINISTRATION EXPENSES

(See instructions on reverse of this sheet)

Item No.	Funeral expenses	Amount
	To Forest Lawn Memorial Park Association for Burial expenses	\$ 365.08
TOTAL (also enter under the Recapitulation, Schedule O)		\$
Amount of executors' commissions (also enter under the Recapitulation, Schedule O) <i>none</i>		\$
Estimated/agreed upon/paid. (Strike out words not applicable.)		\$
Amount of attorneys' fees (also enter under the Recapitulation, Schedule O) <i>none</i>		\$
Estimated/agreed upon/paid. (Strike out words not applicable.) <i>except as below</i>		\$
Item No.	Miscellaneous administration expenses	Amount
	A) Oliver M. Hickey, Attorney	
	To legal services in terminating joint tenancy held by decedent and his wife, Louise Heidt in Superior Court of the State of California, in and for the County of Los Angeles	250.00
	B) To legal services in connection with preparing and attending to this Estate's Tax return under Internal Revenue Code.	250.00
TOTAL (also enter under the Recapitulation, Schedule O)		\$ 500.00

(If more space is needed, insert additional sheets of same size)

ESTATE OF Joint tenancy Joseph H. Heidt, Deceased

INSTRUCTIONS FOR SCHEDULE . FUNERAL AND ADMINISTRATION EXPENSES

Funeral expenses and administration expenses should be itemized, giving names and addresses of persons to whom payable, and exact nature of the particular expense. An item may be entered for deduction though the exact amount is not known at the time, provided it is ascertainable with reasonable certainty, and will be paid. No deduction may be taken upon the basis of a vague or uncertain estimate. Preserve all vouchers and receipts for inspection by an Internal Revenue agent.

The executor or administrator, when filing the return, may deduct his commissions in such an amount as has actually been paid or which at that time it is reasonably expected will be paid, but no deduction may be taken if no commissions are to be collected. In the case the amount of the commissions has not been fixed by decree of the proper court, the deduction will be allowed on the final audit of the return provided: (1) That the Commissioner is reasonably satisfied that the commissions claimed will be paid; (2) that the amount entered as a deduction is within the amount allowable by the laws of the jurisdiction wherein the estate is being administered; and (3) that it is in accordance with the usually accepted practice in said jurisdiction in estates of similar size and character. *If the commissions claimed have not been paid at the time of the final audit of the return, the amount deducted must be supported by an affidavit of the executor stating that such amount has been agreed upon and will be paid.*

A bequest or devise to the executor in lieu of commissions is not deductible. If, however, the decedent fixed by his will the compensation payable to the executor for services to be rendered in the administration of the estate, deduction may be taken to the extent that the amount so fixed does not exceed the compensation allowable by the local law or practice.

Amounts paid as trustees' commissions do not constitute expenses of administration and are not deductible, whether received by the

executor acting in the capacity of a trustee or by a separate trustee as such.

When filing the return there may be deducted such an amount of attorney's fees as has actually been paid or which at that time it is reasonably expected will be paid. If on the final audit of the return the fees claimed have not been awarded by the proper court and paid, the deduction will be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. *If the fees claimed have not been paid at the time of the final audit of the return, the amount deducted must be supported by an affidavit of the executor or the attorney stating that such amount has been agreed upon and will be paid.*

Attorney's fees incident to litigation instituted by the beneficiaries as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charged against the beneficiaries personally and are not administration expenses as contemplated by the statute.

Executors and attorneys should note that executors' commissions and attorneys' fees constitute taxable income and that the amounts received or receivable by them as such compensation are cross-referenced for income-tax purposes.

Estate, legacy, succession, and inheritance taxes, and taxes on income received after death, are not deductible. Deduction for property taxes is limited to such taxes as accrued prior to the decedent's death. Credit to a limited extent may, under "Computation of Tax", sheet XX be claimed for estate, legacy, succession, inheritance, and gift taxes.

SCHEDULE K **DEBTS OF DECEDENT**

(See instructions on reverse of this sheet)

Item No.	Creditor and nature of claim	Amount
		\$
		None
TOTAL (also enter under the Recapitulation, Schedule O).....		\$

(If more space is needed, insert additional sheets of same size)

ESTATE OF Joint tenancy Joseph H. Heidt, Deceased

SCHEDULE L
MORTGAGES AND LIENS

(See instructions on reverse of this sheet)

Item No.	Description	Amount
	None	\$

TOTAL (also enter under the Recapitulation, Schedule O).....

\$

(If more space is needed, insert additional sheets of same size)

ESTATE OF Joint tenancy Joseph H. Heidt, Deceased

INSTRUCTIONS FOR SCHEDULE L

MORTGAGES AND LIENS

Itemize under this schedule only obligations secured by mortgages or other liens upon property included in the gross estate. List under this schedule all notes and other obligations secured by the deposit of collateral, such as stocks, bonds, etc. Debts of the decedent unsecured by mortgage or other lien upon the property should be listed under Schedule K. Identify, by indicating under the column headed "Description", the particular schedule and item number where such property subject to the mortgage or lien is returned under the gross estate. The full value of the property, without any reduction for the mortgage or other indebtedness, must be returned as part of the gross estate. Real estate situated outside the United States does not form a part of the gross estate for the purpose of the tax, and no deduction may be taken of any mortgage thereon, or any indebtedness in respect thereto.

Show the name and address of the mortgagee, payee, or obligee, and the date and term of the mortgage, note, or other agreement under which the indebtedness is established. Show the face amount, the unpaid balance, the rate of interest, and date to which the interest was paid prior to the decedent's death.

Mortgages upon, or any indebtedness with respect to, property included in the gross estate is deductible only to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth.

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SCHEDULE M **NET LOSSES AND SUPPORT OF DEPENDENTS**

(See instructions on reverse of this sheet)

Item No.	Net losses during administration	Amount
	None	\$
TOTAL (also enter under the Recapitulation, Schedule O)		\$
Item No.	Support of dependents	Amount
	None	\$
TOTAL (also enter under the Recapitulation, Schedule O)		\$

(If more space is needed, insert additional sheets of same size)

ESTATE OF Joint tenancy Joseph H. Heidt, Deceased

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Form XVI

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INSTRUCTIONS FOR SCHEDULE M

NET LOSSES AND SUPPORT OF DEPENDENTS

Losses.—Losses are strictly limited to those arising from fire, storm, shipwreck, or other casualty, or from theft, to the extent that such losses are not compensated for by insurance, or otherwise. Losses in order to be deductible must occur during the settlement of the estate. Depreciation in the value of securities or other property does not constitute a deductible loss. Such losses are not deductible if, at the time of the filing of the estate tax return, they had been claimed as a deduction for income tax purposes in an income tax return. In listing losses, full particulars must be given not only as to the loss sustained, but the cause thereof, and in the case of death of livestock, the cause of death must be stated, if known. If insurance or other compensation was received on account of loss, state the amount collected. The property with

respect to which the loss is claimed should be identified by indicating the particular schedule and item number where such property is returned under the gross estate.

If the optional valuation is adopted, deduction for any loss is limited to the extent that such loss is not in effect allowed in the valuation of the item in the gross estate.

Support of dependents.—No deduction may be taken for support of dependents unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the support of the person in question during the settlement of the estate, and actual disbursement was made from the assets of the estate to the dependents.

16-28482-1

INSTRUCTIONS FOR SCHEDULE N

CHARITABLE, PUBLIC, AND SIMILAR GIFTS AND BEQUESTS

Deductions authorized for charitable, public, and similar gifts and bequests as set forth in the Estate Tax Regulations should be claimed under this schedule. If the transfer was made by will, duplicate copies, one certified, of the order admitting the will to probate, in addition to the copies of the will, should be submitted with the return. If the transfer was made by any other written instrument, duplicate copies thereof should be submitted with the return, and if the instrument is of record one copy should be certified and if not of record one copy should be verified. If the transfer was made by will, an affidavit of the executor must be submitted, showing whether the decedent's will has been, or to the best of his knowledge, information, and belief, will be contested. If claim is made for deduction of the value of the residue or of a portion thereof (a. g., present worth of a remainder interest in the residue), there should be submitted a copy of the computation whereby the value was determined.

If under the terms of the will or the law of the jurisdiction wherein the estate is administered or the law of the jurisdiction imposing the particular tax, the Federal estate tax or any estate, succession, legacy, or inheritance tax is payable in whole or in part out of any bequest, legacy, or devise deductible hereunder, the sum deductible is the amount of such bequest, legacy, or devise so reduced.

If the optional valuation is adopted, any bequest, legacy, devise, or transfer deductible under this schedule shall be valued for the purpose of the deduction as of the date of the decedent's death, with adjustment for any difference in the value of the property 1 year after his death, or at the date of its sale, or exchange within such year, except that no such adjustment may take into account any difference in value due to mere lapse of time or to the occurrence or nonoccurrence of a contingency.

For further instructions, see Estate Tax Regulations.

SCHEDULE O RECAPITULATION

Schedule	Gross estate	Value under option	Value at date of death
A	Real estate <i>Joint Tenancy</i>	\$	\$ 57,000 ✓
B	Stocks and bonds		
C	Mortgages, notes, and cash		12,680.09 ✓
D	Insurance		
E	Jointly owned property <i>as above</i>		
F	Other miscellaneous property		
G	Transfers during decedent's life <i>none</i>		
H	Powers of appointment		
I	Property previously taxed		
TOTAL GROSS ESTATE		\$	\$ 69,680.09 ✓
Schedule	Deductions	Amount	
J	Funeral expenses	\$	365.08 ✓
	Executors' commissions <i>none</i>		
	Attorneys' fees		500.00 ✓
	Miscellaneous administration expenses		
K	Debts of decedent <i>none</i>		
L	Mortgages and liens <i>none</i>		
M	Net losses during administration <i>none</i>		
	Support of dependents <i>none</i>		
N	Charitable, public, and similar gifts and bequests <i>none</i>		
TOTAL DEDUCTIONS, except specific exemption and property previously taxed		\$	\$ 865.08 ✓

SCHEDULE P

NET ESTATE FOR THE BASIC TAX—RESIDENT OR CITIZEN

Instructions.—This schedule should be used only for the estate of a resident or citizen of the United States.

1. Total gross estate		\$ 69,680.09 ✓
2. Total deductions, except specific exemption and property previously taxed	\$ 865.08 ✓	
3. Specific exemption	100,000.00	
4. Total deductions, except property previously taxed (Item 2 plus Item 3)	\$ 100,865.08 ✓	
5. Deduction for property previously taxed without proportionate reduction (Schedule I, item c)	\$	
6. Proportionate reduction (proportion of Item 4 that Item 5 bears to Item 1)	\$	
7. Net deduction for property previously taxed (Item 5 minus Item 6)	\$	
8. Total deductions (Item 4 plus Item 7)		\$ 100,865.08 ✓
9. Net estate (Item 1 minus Item 8)		\$ 100,865.08 ✓

Estate of *Joint tenancy Joseph H. Heidt*

SCHEDULE Q

NET ESTATE FOR THE ADDITIONAL TAX—RESIDENT OR CITIZEN

Instructions.—This schedule should be used only for the estate of a resident or citizen of the United States.

1. Total gross estate.....		\$ 67,480.00
2. Total deductions, except specific exemption and property previously taxed.....	\$ 865.08	
3. Specific exemption.....	\$ 642.00	
4. Total deductions, except property previously taxed (item 2 plus item 3).....		
5. Deduction for property previously taxed without proportionate reduction (Schedule I, item c).....	\$	
6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1).....	\$	
7. Net deduction for property previously taxed (item 5 minus item 6).....	\$	
8. Total deductions (item 4 plus item 7).....		\$ 60,865.08
9. Net estate (item 1 minus item 8).....		\$ 8,815.01

SCHEDULE R

NET ESTATE—NONRESIDENT ALIEN

Instructions.—This schedule should be used only for the estate of a nonresident alien of the United States. No deductions are allowable hereunder unless the value of that part of the gross estate situated outside the United States is set forth.

1. Value of gross estate in the United States (Schedules A, B, C, D, E, F, G, H, and I).....	\$
2. Value of gross estate outside the United States (insert itemized schedule sheet showing values).....	\$
3. Value of total gross estate wherever situated (item 1 plus item 2).....	\$
4. Gross deductions under Schedules J, K, L, and M.....	\$
5. Net deductions under Schedules J, K, L, and M (that proportion of item 4 that item 1 bears to item 3).....	\$
6. Charitable, public, and similar gifts and bequests, Schedule N.....	\$
7. Total deductions, except property previously taxed (item 5 plus item 6).....	\$
8. Deduction for property previously taxed without proportionate reduction (Schedule I, item c).....	\$
9. Proportionate reduction (proportion of item 7 that item 8 bears to item 1).....	\$
10. Net deduction for property previously taxed (item 8 minus item 9).....	\$
11. Total deductions (item 7 plus item 10).....	\$
12. Net estate (item 1 minus item 11).....	\$

INSTRUCTIONS FOR COMPUTATION OF TAX

For computation of tax, use the table set forth on the inside of the back cover.

Item 1. "Gross basic tax" is computed, by means of column 1 of the table, on the value of the net estate shown under Schedule P or Schedule R, as the case may be.

Item 3. "Credit for gift tax" is limited to such credit allowable under the statute against the gross basic tax. The gift tax must have been paid by or on behalf of the decedent in respect of property included in the gross estate. The credit cannot exceed the proportion of the gross basic tax, item 1, that the value of the included gift taxed bears to the entire gross estate, unless the gift tax was imposed by the Revenue Act of 1924, as amended, in which case the entire amount is allowable as a credit against the gross basic tax.

Item 4. "Credit for estate, inheritance, legacy, or succession tax" is allowed for such taxes paid as the result of the decedent's death in any State, Territory, or the District of Columbia (or, if the decedent died after June 20, 1939, to any possession of the United States), with respect to property included in the gross estate. This credit cannot exceed 90 percent of item 3. The anticipated amount of the credit may be entered at item 4 and the Federal estate tax shown on the return computed in accordance therewith before such State, etc., taxes have been paid, but the credit cannot be finally allowed unless such taxes are actually paid and the credit therefor is claimed within 4 years after the return is filed (or within such further period as provided by the statute in the case of a petition filed with the United States Board of Tax Appeals or in the case of an extension or postponement of time for the payment of tax), and such credit is supported by the following evidence:

(1) Certificate of the proper officer of the taxing State, Territory, District of Columbia, or possession of the United States showing: (a) The total amount of tax imposed (before adding interest and penalties and before allowing discount); (b) the amount of discount allowed; (c) the amount of penalties and interest imposed or charged; (d) the total amount actually paid in cash; and (e) the date of payment.

(2) A certificate of the above-mentioned officer showing whether (a) a claim for refund of such taxes or any part thereof is pending and (b) whether a refund of such taxes or any part thereof has been authorized. If any refund has been made, the date, the amount thereof, and a description of the property or interest in respect to which such refund was made must be shown in the certificate.

(3) Such additional proof as the Commissioner may specifically request.

If practicable the evidence described in (1) and (2), above, should be filed with the return, but if that is not convenient or possible it should be submitted as soon thereafter as practicable.

Item 5. "Total gross taxes (basic and additional) (Tentative Tax)" are computed on the value of the net estate shown under Schedule Q or Schedule R, as the case may be. If the decedent died before September 21, 1941, column 2 of the table should be used for this item. (See examples 1, 2, and 3 below.) If the decedent died after September 20, 1941, column 3 of the table should be used for this item. (See example 4 below.)

Item 9. "Credit for gift tax" is limited to such credit allowable under the statute against the gross additional tax. The gift tax must have been paid by or on behalf of the decedent in respect of property included in the gross estate. Such credit cannot exceed the proportion of the gross additional estate tax that the value of the included gift taxed bears to the entire gross estate, and furthermore cannot exceed the difference between the total amount of such gift tax and the gift tax credit therefor allowed against the gross basic tax. No credit, however, is allowable against the gross additional tax for gift tax imposed by the Revenue Act of 1924, as amended.

Item 12. "Defense tax" is applicable if the decedent died after the date of the enactment of the Revenue Act of 1940 (June 25, 1940), and on or before the enactment of the Revenue Act of 1941 (September 20, 1941). The amount of the defense tax is 10 percent of the total net basic and additional taxes, item 11.

Item 13. "Total estate tax payable" is the sum of the net basic tax, the net additional tax, and (if applicable) the defense tax.

Example (1) (estate of decedent who died before September 21, 1941, subject to the basic tax, the additional tax and the defense tax, and involving credit for State inheritance and estate taxes). A resident of the United States died July 1, 1940, and the value of the net estate shown under Schedule P is \$210,000. The tax shown in the first subcolumn of column 1 of the table on a net estate equaling \$200,000 is \$4,500. As \$210,000 exceeds \$200,000

and falls below \$400,000, the tax on the excess of \$10,000 is computed at the rate of 4 percent, the rate shown in the second subcolumn of column 1. The \$400 tax on such excess added to \$4,500 gives \$4,900, the gross basic tax which should be entered at item 1. Credit for gift tax is not involved in this example, but it will be assumed that the maximum amount of credit for State estate, inheritance, legacy, or succession taxes is allowable; that is, 90 percent, or \$3,920, which should be entered at item 4. The difference, which is the net basic tax, is \$980. The net estate shown under Schedule Q is \$376,000. The amount of the total gross taxes (basic and additional—Tentative Tax) shown in the first subcolumn of column 2 on a net estate equaling \$300,000, is \$36,680. As \$270,000 exceeds \$200,000 and falls below \$400,000, the amount of the total gross taxes on the excess of \$70,000 is computed at 20 percent, the rate shown in the second subcolumn of column 2. The \$14,000, computed on such excess, added to \$36,680, gives \$40,680, the total gross taxes, and \$40,680 should be entered at item 6. From the \$40,680 is subtracted \$4,900, the gross basic tax, and the difference, \$35,780, is the gross additional tax which should be entered at item 8. As in this example no credit for gift tax is involved, the gross additional tax is the same as the net additional tax. The net basic tax, \$980, item 5, added to the net additional tax, \$35,780, item 10, results in a total of \$36,680 which should be entered at item 11. Since the decedent died after the date of the enactment of the Revenue Act of 1940 (June 25, 1940) and before September 21, 1941, the defense tax imposed is 10 percent of \$36,680, or \$3,668, which should be entered at item 12. The sum of \$36,680 and \$3,668 (item 11 plus item 12) is \$40,348, the total estate tax payable, which should be entered at item 13. The computation of the tax in this example is set up below.

1. Gross basic tax.....	\$4,900
2. Credit for gift tax.....	0
3. Gross basic tax less credit for gift tax.....	\$4,900
4. Credit for estate, inheritance, legacy, or succession tax.....	3,920
5. Net basic tax.....	\$980
6. Total gross taxes (basic and additional) (Tentative Tax).....	\$40,680
7. Gross basic tax.....	4,900
8. Gross additional tax.....	\$35,780
9. Credit for gift tax.....	0
10. Net additional tax.....	\$35,780
11. Total net basic and additional taxes.....	\$36,680
12. Defense tax.....	3,668
13. Total estate tax payable.....	\$40,348

Example (2) (estate of decedent who died before September 21, 1941, subject to the additional estate tax and the defense tax only): A resident of the United States died on July 1, 1940, and the value of the gross estate is \$85,000. Deductions for administration expenses and debts are allowed in the amount of \$10,000, leaving \$75,000 before the deduction of the specific exemption. As the specific exemption allowed by the Internal Revenue Code in determining the net estate upon which the basic estate tax is imposed is \$100,000, it is apparent under Schedule P that this estate is not subject to such basic tax. However, as the specific exemption allowed by the Internal Revenue Code for the purpose of determining the additional estate tax is only \$40,000, this estate is subject to such additional estate tax. For the purpose of the additional estate tax the net estate is \$35,000 as would be shown under Schedule Q. The total gross taxes, shown in the first subcolumn of column 2 on a net estate equaling \$30,000 are \$1,200. As \$35,000 exceeds \$30,000 and falls below \$10,000, the amount of the total gross taxes on the excess of \$5,000 is computed at the rate of 8 percent, the rate shown in the second subcolumn of column 2. The \$400, computed on such excess, added to \$1,200, gives \$1,600, the total gross taxes. As no basic estate tax is imposed, this amount is the same as the gross additional tax, and since credit for gift tax is not involved in this example, the gross additional tax is the same as the net additional tax. It will be noted that no credit for estate, inheritance, legacy, or succession taxes is authorized in the computation of the additional tax. The decedent, having died after the date of the enactment of the Revenue Act of 1940 (June

COMPUTATION OF TAX

(See instructions on reverse of Sheet XX)

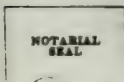
1. Gross basic tax	\$	
2. Credit for gift tax	\$	
3. Gross basic tax less credit for gift tax (Item 1 minus Item 2)	\$	
4. Credit for estate, inheritance, legacy, or succession tax	\$	
5. Net basic tax (Item 3 minus Item 4)	\$	
6. Total gross taxes (basic and additional) (Tentative Tax)	\$	
7. Gross basic tax	\$	
8. Gross additional tax (Item 6 minus Item 7)	\$	
9. Credit for gift tax	\$	
10. Net additional tax (Item 8 minus Item 9)	\$	
11. Total net basic and additional taxes (Item 5 plus Item 10)	\$	
12. Defense tax (10% of Item 11) ¹	\$	
13. Total estate tax payable	\$	4705

¹ Defense tax applicable if decedent died after June 21, 1940, and before September 21, 1941.

AFFIDAVIT OF PERSON OR PERSONS FILING RETURN

We/I, Louise Seesley formerly Louise Heidt, the surviving joint tenant

the undersigned executor, administrator, beneficiary, custodian, trustee, swear (or affirm) that we/I have carefully examined this return (including the additional sheets inserted, if any); that to the best of our/my knowledge, information, and belief, herein is listed all of the property constituting the decedent's gross estate, as defined by the statute (or if the decedent was a nonresident alien of the United States, herein is listed all of the property constituting the gross estate situated in the United States, as defined by the statute, and, if deductions are claimed, herein is listed separately all of the property constituting the gross estate situated outside the United States); that we/I have no knowledge of any transfers made or trusts created by the decedent during his lifetime of the value of \$5,000 or more, other than bona fide sales for an adequate and full consideration in money or money's worth, except as stated in Schedule G; and that, to the best of our/my knowledge, information, and belief, the fair market value as of the date of the decedent's death is shown for every item of property listed herein under the gross estate (and, in case the optional valuation is herein adopted, that all of the distributions, sales, exchanges, and other dispositions within the year following the decedent's death of the property included in the gross estate, together with the dates thereof, are fully disclosed, and that the value under the option for every item of property is the fair market value as of the applicable valuation date or is such value as properly adjusted), that the debts, expenses, and charges entered herein as deductions from the gross estate are correct and legally allowable, and that all statements made herein are true and correct.



Sworn to and subscribed before me

(Signature)

this 14th day of

January
(Address)

Louise Seesley
Louise Heidt
745 S. Dunsmuir - Los Angeles, Calif.

June 1943

(Signature)

(Address)

David Salter
(Signature and title of officer administering oath)

and for the County of Los Angeles, State of California

(Signature)

(Address)

AFFIDAVIT OF ATTORNEY OR AGENT PREPARING RETURN

I swear (or affirm) that I prepared this return for the person or persons signing the above affidavit and that this return, including the additional sheets inserted, if any, is a true, correct, and complete statement of all the information respecting the estate tax liability of this estate of which I have any knowledge.

Sworn to and subscribed before me

(Signature)

this 2 day of

(Address)

Oliver M. Hickey (att'y)
448 South Hill Street
Los Angeles, California

June 1943



David Salter
(Signature and title of officer administering oath)

ESTATE OF Joint tenancy Joseph M. Heidt, Decedent

INSTRUCTIONS FOR COMPUTATION OF TAX—United

25, 1940) and prior to September 21, 1941, the defense tax imposed is 10 percent of the net additional tax of \$1,925, or \$192. Consequently, the total tax payable in this case is \$1,760.

Example (3) (estate of decedent who died before September 21, 1941, subject to the basic tax, the additional tax and the defense tax and involving credits for State inheritance tax and for gift tax). The decedent, a resident of the United States, died on July 15, 1940. The total value of the gross estate is \$400,000, the value of the net estate for the purpose of the basic estate tax is \$225,000 and the value of the net estate for the purpose of the additional tax is \$385,000. The gross basic tax computed on the net estate of \$225,000 is \$5,500 and the total gross taxes on the net estate of \$385,000 are \$43,600. (See explanation in the above examples of the use of the table in computing the tax.) The decedent transferred on January 15, 1940, in contemplation of death, certain real estate to his daughter as a gift. The value of the real property as of the date of the gift, and as of the time of death, was \$144,000. As the result of this gift, a gift tax of \$7,200 was paid on a net gift of \$100,000 (\$4,000 excluded and the specific exemption of \$40,000 deducted under the gift tax provisions of the Internal Revenue Code). As the value of the transferred real property is included in the decedent's gross estate, a credit for gift tax is allowed against the gross basic tax, \$5,500, not to exceed the proportion of \$5,500, item 1, that the value of the included gift, \$140,000, bears to the entire gross estate, \$400,000. It will be noted that the amount of the included gift is \$144,000 less \$4,000, the amount excluded in determining the amount for purposes of the gift tax. This proportion, which is ascertained by dividing \$140,000 by \$400,000, is 0.35. The gift tax credit allowed against the gross basic tax is, therefore, 0.35 of \$5,500, or \$1,925, which is entered at item 2. The difference between \$5,500 and \$1,925 is entered at item 3. Maximum credit for State inheritance and estate taxes is allowed in this example in the amount of \$2,860, entered at item 4. The net basic tax is \$715, item 5. The total gross taxes of \$43,600 are entered at item 6, the gross basic tax of \$5,500 is entered at item 7, and the gross additional tax of \$38,100 is entered at item 8. Credit for the gift tax paid (\$7,200) is allowed against the gross additional tax, not to exceed the proportion of \$38,100, item 8, that the value of the included gift, \$140,000, bears to the entire gross estate, \$400,000. The amount of this proportion is \$13,335. However, this credit is further limited by an amount not to exceed the difference between the total of the gift tax, \$7,200, and the credit, \$1,925, allowed for such tax against the gross basic tax. This difference, \$5,275, is the amount of the credit allowed against the gross additional tax, and is entered at item 9. The net additional tax, item 8 minus item 9, is \$32,825, and is entered at item 10. The total net basic and additional taxes of \$33,540 (item 5 plus item 10) is shown at item 11. The defense tax, which is applicable in this case, is \$3,354 (10 percent of item 11) and is entered at item 12. The total tax payable, \$36,894, is

entered at item 13. The computation of the tax in this example is set up as follows:

1. Gross basic tax.....	\$5,500	
2. Credit for gift tax.....	1,925	
3. Gross basic tax less credit for gift tax.....	\$3,575	
4. Credit for estate, inheritance, legacy, or succession tax.....	2,860	
5. Net basic tax.....		\$715
6. Total gross taxes (basic and additional) (Tentative Tax).....	\$43,600	
7. Gross basic tax.....	5,500	
8. Gross additional tax.....	\$38,100	
9. Credit for gift tax.....	5,275	
10. Net additional tax.....		\$32,825
11. Total net basic and additional taxes.....		\$33,540
12. Defense tax.....		3,354
13. Total estate tax payable.....		\$36,894

Example (4) (estate of decedent who died after September 20, 1941, subject only to the additional tax): A resident of the United States died on September 30, 1941, and the value of the gross estate is \$75,000. Deductions for administration expenses and debts are allowed in the amount of \$10,000, leaving \$65,000 before the deduction of the specific exemption. As the specific exemption allowed by the Internal Revenue Code in determining the net estate upon which the basic estate tax is imposed is \$100,000, it is apparent under Schedule F that this estate is not subject to such basic tax. However, as the specific exemption allowed by the Internal Revenue Code for the purpose of determining the additional estate tax is only \$40,000, this estate is subject to such additional estate tax. For the purpose of the additional estate tax the net estate is \$25,000, as would be shown under Schedule Q. The total gross taxes, shown in the first subcolumn of column 3 on a net estate equaling \$20,000 are \$1,600. As \$25,000 exceeds \$20,000 and falls below \$30,000, the amount of the total gross taxes on the excess of \$5,000 is computed at the rate of 14 percent, the rate shown in the second subcolumn of column 3. The \$700, computed on such excess, added to \$1,600, gives \$2,300, the total gross taxes. Since no basic estate tax is imposed, this amount is the same as the gross additional tax, and since credit for gift tax is not involved in this example, the gross additional tax is the same as the net additional tax. (No credit for estate, inheritance, legacy, or succession taxes is authorized in the computation of the additional tax.) It will be noted that since the decedent died after the date of the enactment of the Revenue Act of 1941 (September 20, 1941), no defense tax is imposed upon such net additional tax. Consequently, the total tax payable in this case is \$2,300.

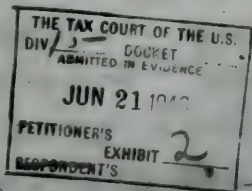
1 We, Marie Wiese, and Ferdinand Wiese, her husband, of
2 the County of San Bernardino, State of California, for and
3 in consideration of the love and affection which we have
4 for our daughter Louisa Heidt, of the same County and
5 State, do hereby give and grant to said Louisa Heidt, all
6 that real property situated in the County of San Bernardino,
7 State of California, known and described as Lot number
8 Twenty-five (25), in Block number One Hundred and Twelve (112)
9 of the City of Colton, according to the map of the original
10 town of Colton made and published at the instance of the
11 Western Development Company.

12 To have and to hold the same as her sole and separate
13 property.

14 IN WITNESS WHEREOF, we do hereunto sign our names, this
15 9th day of August, 1893.

16 Marie Wiese

17 Ferdinand Wiese



Three
to
Heidt

* 8

Recorded at Request of
Louise Heidt

Aug 11 1893
at 35 min. past 9. A. M.
in Book 184 Heide
Page 137
Records Sag. Bernardino County.
call

John Rodman
County Recorder
J. J. Johnson
Deputy Recorder
Tolson
Recd \$110 paid.

Deed
Home Wier and
Frankland Wier

To
Louise Heidt
Dated Aug 9 1893

United States Circuit Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 5802

ESTATE OF JOSEPH H. HEIDT, Deceased,
LOUISE SEELEY, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth District:

Comes now the petitioner, above named, and re-
spectfully shows:

I.

Nature of the Controversy

Joseph H. Heidt died a resident of North Ridge, California, on November 22, 1942, at the age of ninety nine years and eleven days. The petitioner, Louise Seeley, formerly Louise Heidt, is his widow and since his death has remarried.

The said Louise Seeley duly filed the Federal Estate Tax Return (Form 706) on June 14, 1943, with the Collector of Internal Revenue for the Sixth District of California. The petitioner, the said Louise Seeley, as the widow of said decedent,

[190] is the surviving joint tenant of the eight items of property involved in this controversy.

Respondent determined a deficiency in estate tax against petitioner, in the sum of Sixteen Thousand Four Hundred Thirty Five and 1/100 (\$16,435.01) Dollars. This deficiency arose because respondent asserted that petitioner, in the gross estate of said decedent, should have included the full value of the aforesaid eight items of property held in joint tenancy instead of including only one-half their value as was done in the said Federal estate tax return.

Petitioner filed an appeal with the Tax Court of the United States.

The case was tried at Los Angeles, California, on June 21, 1946, before the honorable Eugene Black, Judge of the Tax Court of the United States. The case was submitted on documentary evidence and oral testimony. At the close of the hearing Judge Black directed that petitioner file an Opening Brief on or before August 5, 1946; that the respondent could file a Brief on or before September 5, 1946; that the petitioner might reply to said Brief on or before October 5, 1946; that thereafter the time for the filing of petitioner's Opening Brief was extended to September 1, 1946; that on September 9, 1946, the petitioner's Opening Brief was, on leave of the Court, filed; that on October 8, 1946, respondent's Brief was filed with the Court.

Under date of May 6, 1947, the Tax Court of the United States, by Judge Harlan, who did not hear the witnesses, [191] promulgated its Findings of Fact and Opinion after a review by the full Court

of said opinion. Judge Murdock, in an opinion, dissented from the above decision. He was joined in his dissent by Judges Van Fossan and Leech. On May 6, 1947, the same day, the Tax Court of the United States entered its decision that there was a deficiency in estate tax due from petitioner, in the amount of Sixteen Thousand Four Hundred Thirty Five and 1/100 (\$16,435.01). Said decision is reported as 8 Tax Court III. The controversy involves the question whether decedent's wife, as surviving joint tenant of decedent, was able to show that any part of said items of property originally belonged to said survivor and was never acquired by her or received by her from the decedent for less than an adequate and full consideration in money or money's worth. During the whole period of their marriage, approximately fifty (50) years, decedent and petitioner were residents of California, a community property state, and all of the said items of property in controversy were acquired since the time of their marriage, and most of said items of property were acquired after July 29, 1927. Section 811 (e) (1) of the Internal Revenue Code, as amended by Section 402 of the Revenue Act of 1942, requires that there shall be included in the gross estate for estate tax purposes the entire value of property held by the decedent and any other person as joint tenants, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or [192]

money's worth. In its opinion the Tax Court also referred to Section 811 (e) (2) of the Internal Revenue Code which deals with community property. The Court apparently requires that property held in joint tenancy by spouses in community property states fit under the exceptions in both Subsections, namely, Section 811 (e) (1) and 811 (e) (2), in order that it need not be included in the gross estate of the decedent. The petitioner contended that as contributions of a surviving joint tenant to jointly owned property should be excluded from the gross estate of the decedent, that where community property is acquired as the result of the personal services actually rendered by the surviving spouse and jointly owned property is acquired by such community property, only one-half thereof is includable in the gross estate of the decedent. Petitioner also contended that such proportion of said jointly owned property as was acquired from her separate property should be excluded from the gross estate of the decedent. At the trial before the Tax Court of the United States, on June 21, 1946, before the honorable Eugene Black, Judge of the Tax Court of the United States, no oral testimony presented was by the respondent. The documentary evidence consisted of the Federal Estate Tax (Form 706) filed by the petitioner and received in evidence as the joint exhibit of petitioner and respondent and number A-1. Also in evidence was petitioner's Exhibit No. 2, a Deed to petitioner from her mother and father recorded August 11, 1893. This was a Deed of a house and lot located in Col-

ton, [193] California, and was given her as a wedding present by her parents.

In addition, a number of deed were orally put into evidence by reference to the originals made in the Record Books of the Official Records of Los Angeles County. They were admitted as corroboration of the testimony of Louise Seeley and Judge Ingall W. Bull, in which these witnesses testified that petitioner was engaged in a course of business involving the buying and selling and managing of real property in which the money she received as proceeds of the sale of such property or as income from the rental of such property was put into a revolving fund, and that moneys were drawn out of such revolving fund and reinvested in other real estate, and that the proceeds finally went into the purchase and improvement of the said items of property which were on hand at the time of the death of Mr. Heidt, which stood in their names as joint tenants.

Almost all of the oral testimony was given by Louise Seeley, petitioner, in this matter. The only other oral testimony was given by the Honorable Ingall W. Bull, attorney for decedent and petitioner during their marriage from about 1906 until said witness went on the Bench as Judge of the Superior Court of the State of California, in and for the County of Los Angeles, in or about the year 1936. At the conclusion of petitioner's oral testimony the respondent rested without putting on any testimony. The petitioner [194] contended that at least seventy-five per cent (75%) of the aggregate

of the funds in these items of property was contributed either from the separate property of petitioner or from community earnings derived from her personal efforts. Said community earnings were acquired by petitioner as a business woman dealing by trade and by purchase and sale extensively in real properties, both income and non-income, and were received as compensation for personal services actually rendered by petitioner, the surviving spouse. Petitioner further contended that at least one-half of the value of each of the eight items of property and in the aggregate over seventy-five per cent (75%) of the value of the said items was acquired either from the proceeds of separate property of petitioner, which under the law of California retains the character of such property, or that such proportion came from community property acquired after July 29, 1927, as the result of personal services actually rendered by the surviving spouse; that in this case such services were rendered as a business woman, dealing in and managing real properties, the accretions to the community being the result of her unusual skill and abilities in this regard.

The respondent contended that the burden was upon the petitioner to prove to what extent, if any, the surviving spouse contributed to the jointly owned property which was standing in the name of the decedent and the surviving spouse on the date of his death. Respondent contended that the surviving spouse failed to prove any specific contributions to the jointly owned property. Respondent further

contended that all of the said jointly owned property was acquired by the decedent from his [195] separate property or from jointly owned property, the contributions to which by the surviving spouse were not established with mathematical certainty. Petitioner had further contended that the entirety of Item 5, being the Deed of Trust from the Japanese on the Elmo Hotel, should be excluded from the gross estate for the reason that the entirety thereof was acquired from the separate property of the surviving spouse and no part thereof was subject to the testamentary disposition of the decedent; and petitioner also further contended that the entirety of Item 1, being the North Ridge ranch, should be excluded from the gross estate for the reason that the down payment therefor, in the sum of Nine Thousand Dollars (\$9,000.00) originated from the separate property of the surviving spouse, and for the further reason that the installment payments made thereon were so commingled with the separate property of the wife and surviving spouse that the entirety thereof is presumed to be the separate property of the surviving spouse, according to the substantive law of the State of California. Respondent contended that the petitioner had failed to show that the Palm Springs property used to pay for the down payment on the North Ridge Ranch was not the separate property of decedent. This property stood in the name of the wife, the surviving spouse. Respondent also contended that the Trust Deed, which is Item 5 and which was acquired by reason of the sale of the Elmo Hotel

to a Japanese, was not the separate property of the surviving spouse but instead was community property because the hotel was [196] built as a separate business venture by Mr. Heidt. The Court made separate findings of fact as to each of the eight items, and in Items 1, 3 and 6 the amounts that the petitioner contends are clearly shown to have been made by her are set forth in said findings. The Court, however, held that petitioner had failed to show with mathematical certainty that the portion of the consideration furnished by the surviving spouse for the joint property which she seeks to exclude from decedent's gross estate was derived from compensation for personal services actually rendered by the surviving spouse or from her separate property. The dissent said that a portion of the value of Items 1, 3 and 6 should be excluded from decedent's gross estate, because the findings show that parts of those jointly held properties originally belonged to the surviving spouse as a result of her personal efforts and had not been received or acquired by her from the decedent. The dissent said that there had been no failure of proof as to those parts and that an allocation could easily be made.

Petitioner claims that the Court erred in not excluding a portion of the value of Items 1, 3 and 6 from decedent's gross estate, because the findings themselves clearly show that part of those jointly held properties originally belonged to the surviving spouse as a result of her personal efforts, and that these parts had not been received or acquired by

her from the decedent. The petitioner claims that the Court erred in holding that there had been a failure of proof as to these items and that an allocation could not be made thereof. The petitioner claims that the Tax Court erred in not finding that the money used to purchase Item 1 was the separate property of the petitioner. The petitioner claims that the Tax Court erred in not finding that at least one-half of Items 2, 4, 5, 7 and 8 was contributed by petitioner as her separate property or from community property, which community property was acquired as the result of her sole efforts and personal services; and the petitioner further claims that the Court erred in its determination and decision upon these items, in that it made its findings without any evidence or substantial evidence in support thereof.

The petitioner further claims that there was no failure of proof as to these items; that the evidence on each and every item was substantial and uncontradicted and proved petitioner's contentions in regard to them, and that, therefore, on the record there was no other interpretation possible but that the burden placed on petitioner was sustained. The petitioner also claims that the Tax Court misinterpreted the import of Regulation 105, Section 81.22 as amended by T. D. 5239 C. B. 1943, P. 1085, among other things, in that it disregarded the uncontroverted evidence of petitioner's activities in buying, selling, dealing in and managing real properties, both income and non-income, as contributions to the community property and to her separate

property. The petitioner also claims that the Commissioner in Regulation 105, Section 81.22, as amended, has made a clearly erroneous interpretation of the [198] Internal Revenue Code, Section 811 (e), in that such regulation disregards the rule that the Federal Courts shall be bound by state court interpretations of the state of title to and interest in properties. California Civil Code, Section 161a, provides that the wife has a present existing and equal interest in community property. Thus, when it is shown that joint tenancy property was originally community property it has been shown that half of the property held in joint tenancy originally belonged to such person surviving. Furthermore the present, existing and equal interest of the survivor attaches at the instant the property is acquired, and so such property could never have been received or acquired by such surviving spouse from a decedent for less than an adequate and full consideration in money or money's worth.

Petitioner avers that in the records and proceedings before the Tax Court of the United States, in the opinion and decision rendered by the Tax Court of the United States, manifest error occurred and intervened to the prejudice of petitioner, who now assigns the following points on which petitioner intends to rely in this proceeding:

The Tax Court of the United States erred:

(A) In determining and assigning without any evidence or substantial evidence in support thereof

that decedent sometimes bought property, and had the title put in the joint names of himself and his wife.

(B) In failing to determine and decide that Item 1, the property known as North Ridge Ranch, was bought by petition or by her direction out of her separate funds or out of community [199] property, the acquisition of which was attributable to her personal services.

(C) In determining and assigning without any evidence or substantial evidence in support thereof that petitioner had failed to show that the source of the funds invested in the Palm Springs property, which was used or of which the proceeds thereof were used to pay off the down payment on the North Ridge Ranch, was not clearly shown to have been from the separate property of petitioner or from community property attributable to the personal services of petitioner.

(D) In failing to determine and decide in view of the findings that petitioner contributed \$9,000.00 to the purchase of Item 1, that this amount could be attributed to petitioner, and that thus the value of Item 1 reported as part of decedent's gross estate should be reduced by this amount.

(E) In determining and deciding without any evidence or substantial evidence in support thereof that Item 2, consisting of two apartment houses located at Dunsmuir & 8th Streets in Los Angeles, California, was acquired by decedent for cash de-

rived from profits from different trades made by the decedent and his wife, rather than from trades made by petitioner alone.

(F) In failing to determine and decide that said cash derived from profit from different trades and used in the purchase of Item 2 was from the proceeds of trades made by petitioner in the course of her dealings as a real estate business woman buying and selling and managing and dealing in real properties. [200]

(G) In failing to determine and decide that in the case of Item 3, the Sunset Place property, on the basis of the finding as made, an allocation could not have been made as between the contributions of decedent and petitioner, it having been found that petitioner paid about \$15,000.00 for one house on the property and that the decedent paid from \$12,000.00 to \$14,000.00 for the other house.

(H) In determining and deciding without any evidence or substantial evidence in support thereof that decedent purchased Item 4, the El Camino home in Beverly Hills, in determining and deciding without any evidence or substantial evidence in support thereof that such property was acquired by decedent, who took a mortgage on the property as security for a loan, and in failing to determine and decide that said property was purchased by petitioner from funds that she acquired by sale of her separate property, or funds acquired as community property by reason of her personal services.

(I) In determining and deciding without any evidence or substantial evidence in support thereof that Item 5, known as the Elmo Hotel on Ruth Avenue, was built by decedent; that it was first rented and then sold by decedent and that decedent's widow did not know the number of rooms or what its cost was.

(J) In failing to determine and decide that said Item 5, known as the Elmo Hotel, was built by petitioner; that it was rented by petitioner and that the reason that petitioner did not know more about the details on the rent of the rooms was that it was rented to a Japanese who hired a manager to [201] run it for him, and that thus petitioner did not acquire a greater knowledge thereof as she did in certain other cases where she had the management of the income property.

(K) In failing to determine and decide that Item 5 the said Elmo Hotel, was built by petitioner out of funds received by petitioner as proceeds of the sale of her separate property, or from community property acquired by petitioner as the result of her personal services.

(L) In failing to determine and decide in view of the findings thereon that a portion of Item 6, being the joint bank account in the Bank of America in the amount of \$21,951.37, could properly be allocated between decedent and petitioner, it having been found that approximately \$10,000.00 of the amount on deposit in this joint account had been

deposited by decedent's wife, the money coming from rents from different buildings and apartments.

(M) In failing to determine and decide or in failing to make such determination and decision clear that the rents from different buildings and apartments deposited in the bank account constituting Item 6 was from different buildings and apartments, which were either the separate property of petitioner or the community property of petitioner which had been acquired by reason of the personal services of petitioner.

(N) In determining and deciding without any evidence or substantial evidence in support thereof that Item 7, which was the sum of \$1,409.02 deposited in the California Bank, 9941 Wilshire Boulevard, Beverly Hills, California, to the [202] joint account of decedent and his wife, was money that was deposited by the decedent.

(O) In failing to determine and decide that Item 7, which the Court found was derived from the sale of different properties which had been accumulated, was from the sale of different properties which were either the separate property of petitioner or community property which had been acquired as the result of her personal services, and that more than half of the moneys on deposit in said account should have been allocated to petitioner.

(P) In determining and deciding without any evidence or substantial evidence in support thereof that Item 8, consisting of 20 United States Defense

Bonds, the total par value of which was \$2,000.00, were purchased by the decedent with his own funds, and that they were put in the joint names of the decedent and his wife.

(Q) In failing to allow as contributions by the petitioner to the said items of property held in joint tenancy at the death of decedent, the separate property owned by petitioner at the time of her marriage or the separate property acquired since her marriage by gift or the proceeds of such separate property.

(R) In determining and deciding that Regulation 105 Section 81.22, as amended by T. D. 5239 C. B. 1943, P. 1085, is controlling or even persuasive on the instant set of facts.

(S) In failing to determine and decide that Regulation 105, Section 81.22 as amended, is an incorrect statement of [203] the law as set forth in the Internal Revenue Code, Section 811 (e) 1 and 2.

(T) In rendering a decision contrary to law, in that said Regulation 105, Section 81.22 as amended, is illegal and contrary to law.

(U) In rendering a decision contrary to law in that said Regulation 105, Section 81.22 as amended, as applied to the instant situation, has been interpreted and applied illegally and contrary to law.

(V) In determining and deciding that the amendment to Regulation 105, Section 81.22, as made by T. D. 5239 (C. B.) 1943, Page 1085, requires that

the wife's former interest in the community property which has been converted into joint tenancy be not regarded as property originally belonging to her.

(W) In determining and deciding that the Internal Revenue Code, Section 811 (e) (2) requires that the wife's former interest in community property transferred into property held in joint tenancy be not regarded as property originally belonging to her.

(X) In determining and deciding that petitioner must prove with mathematical certainty the amount of her contributions to the items of property held in joint tenancy at the death of decedent derived from her separate property or from compensation received by her for her personal services and efforts.

(Y) In determining and deciding that said Internal [204] Revenue Code, Section 811 (e) (2) requires that if the spouses convert their community ownership into a joint tenancy that the entire property be also taxed as part of the husband's estate.

(Z) In determining and deciding that said Regulation 105, Section 81.22, as amended, is a reasonable regulation and that it should be applied to the facts in the instant proceeding.

(AA) In determining and deciding that petitioner need show that the consideration furnished by surviving spouse for the joint property, which she seeks to exclude from decedent's gross estate,

was derived from compensation for personal services actually rendered by the surviving spouse or from her separate property.

(BB) In failing to recognize the effect of California Civil Code, Section 16a, on community property acquired, and in determining and deciding that the interest of petitioner in the community property came in some way from the decedent rather than as the result of the substantive law of California, which law the Federal Court must follow in matters where title to or interest in property is determined by the state law.

(CC) In failing to determine and decide that petitioner had sustained her burden of proof and had proved that at least one-half of all of the eight items of property was attributable to her separate property or to community property, which had been acquired as the result of her personal services. [205]

(DD) In determining and deciding that petitioner had failed to meet her burden of proof and had failed to show that Items 1 and 5 should be entirely excluded from the gross estate of decedent.

(EE) In determining and deciding contrary to the evidence and the findings of fact as to Items 1, 3 and 6, despite the clear Finding of Fact as to petitioner's contributions thereto, that there was no evidence that any part of the consideration for such items was derived from compensation for personal services actually rendered by the surviving spouse or from her separate property.

(FF) In determining and deciding that there had been a failure of proof as to Items 1, 3 and 6 and that an allocation could not be made thereof as between decedent and petitioner.

(GG) In failing to determine and decide that as matter of law that there was no other interpretation possible but that the burden placed on petition had been met, the evidence on each and every item being substantial and uncontradicted.

(HH) In disregarding the uncontraverted evidence of petitioner's activity in buying, selling, dealing in and managing real properties, both income and non-income, as contributing to the community property and to her separate property.

(II) In rendering a decision contrary to law.

(JJ) In rendering a decision contrary to its findings of fact.

(KK) In determining and deciding that petitioner was liable for the payment of a deficiency in the state tax of \$16,435.01, or any other sum, or any sum at all, because no notice was given to the Commissioner under Internal Revenue Code, Section 901 (a) or (b) in that it is shown by the records, in the official transcript of the proceedings before the Tax Court of the United States on June 21, 1946, Pages 65 and 66, that there was no Executor or Executrix nor is there such Executor or Executrix of the Estate of Joseph H. Heidt, deceased, nor was there any Will admitted to probate, and that in the absence of any notice to the Commissioner under said Section 901 (a) or (b), the

notice of deficiency was not properly given or addressed under Internal Revenue Code, Section 901 (d), and that it was not addressed in the name of the decedent or other person subject to liability and mailed to his last known address, nor was it addressed in the name of the decedent or other person subject to liability at all.

II.

Statute of Limitations

Petitioner claims that as the Federal Estate Tax Return (Form 706) was filed June 14, 1943, with the Collector of Internal Revenue for the Sixth District of California by his widow, Mrs. Louise Seeley, and that as by Internal Revenue Code Section 874 (a) the estate taxes must be assessed within three years after the return was filed, and that no proceeding [207] in Court without assessments for the collection of such taxes shall be begun after the expiration of three years after the return was filed; and further that by Internal Revenue Code, Section 900 (b) the period of limitations for assessment of liability against the transferee as fiduciary shall be one year after the expiration of the period of limitations for assessment against the executor. That, therefore, the statute of limitations has run as to assessing such deficiency.

III.

The Court in Which Review Is Sought

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of

said decision of The Tax Court of the United States is sought, pursuant to the provisions of Section 1141 of the Internal Revenue Code.

IV. Venue

The decision of the Tax Court of the United States determining a deficiency was entered on May 6, 1947.

Joseph H. Heidt was for many years a resident of the County of Los Angeles, State of California, and died therein on November 22, 1942. Decedent's widow, Mrs. Marie Seeley, is the surviving joint tenant of Joseph H. Heidt, deceased. At all times subsequent to the marriage of decedent and petitioner in 1893 they resided in the State of California until the time of decedent's death.

The Federal Estate Tax Return, Form 706, for said [208] estate was duly filed with the United States Collector of Internal Revenue for the Sixth District of California, whose offices are located at Los Angeles, California, and are in the Ninth Judicial Circuit of the United States.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeal other than the one herein designated.

Wherefore, petitioner prays that the decision of the Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and

the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken, to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: August 4th, 1947.

/s/ RALPH W. SMITH,

/s/ OLIVER O. CLARK,

/s/ L. A. LUCE,

/s/ JOHN MOORE ROBINSON,

/s/ ROBERT M. HIMROD,

Suite 917 Bank of America Bldg., 650 South Spring Street, Los Angeles 14, California, Attorneys for Petitioner.

Filed T.C.U.S. August 4, 1947. [209]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner, on the .. day of August, 1947, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above entitled cause.

A copy of the petition for review as filed is hereby attached and served [210] upon you.

Dated this . . day of August, 1947.

/s/ RALPH W. SMITH,

/s/ OLIVER O. CLARK,

/s/ L. A. LUCE,

/s/ JOHN MOORE ROBINSON,

/s/ ROBERT M. HIMROD,

Suite 917 Bank of America Bldg., 650 South Spring
Street, Los Angeles 14, California, Attorneys
for Petitioner.

Acknowledgment of Service

Personal service of the foregoing Notice, together with a copy of the Petition for Review is hereby acknowledged this 4th day of August, 1947.

/s/ CHARLES OLIPHANT, CAR

Acting Chief of Counsel, Bureau of Internal Revenue, Counsel for Respondent.

Filed T.C.U.S., August 4, 1947. [211]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Comes now the petitioner for review in the above entitled cause, by and through her counsel, and states

that the points upon which she intends to rely in this case are as follows:

The Tax Court of the United States erred:

(A) In determining and assigning without any evidence or substantial evidence in support thereof that decedent sometimes bought property, and had the title put in the joint names of himself and his wife.

(B) In failing to determine and decide that Item 1, the property known as North Ridge Ranch, was bought by petitioner or by her direction out of her separate funds or out of community [212] property, the acquisition of which was attributable to her personal services.

(C) In determining and assigning without any evidence or substantial evidence in support thereof that petitioner had failed to show that the source of the funds invested in the Palm Springs property, which was used or of which the proceeds thereof were used to pay off the down payment on the North Ridge Ranch, was not clearly shown to have been from the separate property of petitioner or from community property attributable to the personal services of petitioner.

(D) In failing to determine and decide in view of the findings that petitioner contributed \$9,000.00 to the purchase of Item 1, that this amount could be attributed to petitioner, and that thus the value of Item 1 reported as part of decedent's gross estate should be reduced by this amount.

(E) In determining and deciding without any evidence or substantial evidence in support thereof that Item 2, consisting of two apartment houses located at Dunsmuir & 8th Streets in Los Angeles, California, was acquired by decedent for cash derived from profits from different trades made by the decedent and his wife, rather than from trades made by petitioner alone.

(F) In failing to determine and decide that said cash derived from profit from different trades and used in the purchase of Item 2 was from the proceeds of trades made by petitioner in the course of her dealings as a real estate business woman buying and selling and managing and dealing in real properties. [213]

(G) In failing to determine and decide that in the case of Item 3, the Sunset Place property, on the basis of the finding as made, an allocation could not have been made as between the contributions of decedent and petitioner, it having been found that petitioner paid about \$15,000.00 for one house on the property and that the decedent paid from \$12,000.00 to \$14,000.00 for the other house.

(H) In determining and deciding without any evidence or substantial evidence in support thereof that decedent purchased Item 4, the El Camino Home in Beverly Hills, in determining and deciding without any evidence or substantial evidence in support thereof that such property was acquired by decedent, who took a mortgage on the property as security for a loan, and in failing to determine and

decide that said property was purchased by petitioner from funds that she acquired by sale of her separate property, or funds acquired as community property by reason of her personal services.

(I) In determining and deciding without any evidence or substantial evidence in support thereof that Item 5, known as the Elmo Hotel on Ruth Avenue, was built by decedent; that it was first rented and then sold by decedent and that decedent's widow did not know the number of rooms or what its cost was.

(J) In failing to determine and decide that said Item 5, known as the Elmo Hotel, was built by petitioner; that it was rented by petitioner and that the reason that petitioner did not know more about the details on the rent of the rooms was that it was rented to a Japanese who hired a manager to run it for him, and that thus petitioner did not acquire a greater knowledge thereof as she did in certain other cases where she had the management of the income property.

(K) In failing to determine and decide that Item 5, the said Elmo Hotel, was built by petitioner out of funds received by petitioner as proceeds of the sale of her separate property, or from community property acquired by petitioner as the result of her personal services.

(L) In failing to determine and decide in view of the findings thereon that a portion of Item 6, being the joint bank account in the Bank of America

in the amount of \$21,951.37, could properly be allocated between decedent and petitioner, it having been found that approximately \$10,000.00 of the amount on deposit in this joint account had been deposited by decedent's wife, the money coming from rents from different buildings and apartments.

(M) In failing to determine and decide or in failing to make such determination and decision clear that the rents from different buildings and apartments deposited in the bank account constituting Item 6 was from different buildings and apartments, which were either the separate property of petitioner or the community property of petitioner which had been acquired by reason of the personal services of petitioner.

(N) In determining and deciding without any evidence or substantial evidence in support thereof that Item 7, which was the sum of \$1,409.02 deposited in the California Bank, 9941 Wilshire Boulevard, Beverly Hills, California, to the [215] joint account of decedent and his wife, was money that was deposited by the decedent.

(O) In failing to determine and decide that Item 7, which the Court found was derived from the sale of different properties which had been accumulated, was from the sale of different properties which were either the separate property of petitioner or community property which had been acquired as the result of her personal services, and that more than half of the moneys on deposit in said account should have been allocated to petitioner.

(P) In determining and deciding without any evidence or substantial evidence in support thereof that Item 8, consisting of 20 United States Defense Bonds, the total par value of which was \$2,000.00, were purchased by the decedent with his own funds, and that they were put in the joint names of the decedent and his wife.

(Q) In failing to allow as contributions by the petitioner to the said items of property held in joint tenancy at the death of decedent, the separate property owned by petitioner at the time of her marriage or the separate property acquired since her marriage by gift or the proceeds of such separate property.

(R) In determining and deciding that Regulation 105 Section 81.22, as amended by T.D. 5239 C.B. 1943, P. 1085, is controlling or even persuasive on the instant set of facts.

(S) In failing to determine and decide that Regulation 105, Section 81.22 as amended, is an incorrect statement of [216] the law as set forth in the Internal Revenue Code, Section 811 (e) 1 and 2.

(T) In rendering a decision contrary to law, in that said Regulation 105, Section 81.22 as amended, is illegal and contrary to law.

(U) In rendering a decision contrary to law in that said Regulation 105, Section 81.22 as amended, as applied to the instant situation, has been interpreted and applied illegally and contrary to law.

(V) In determining and deciding that the amendment to Regulation 105, Section 81.22, as made by T.D. 5239 (C.B.) 1943, Page 1085, requires that the wife's former interest in the community property which has been converted into joint tenancy be not regarded as property originally belonging to her.

(W) In determining and deciding that the Internal Revenue Code, Section 811 (e) (2) requires that the wife's former interest in community property transferred into property held in joint tenancy be not regarded as property originally belonging to her.

(X) In determining and deciding that petitioner must prove with mathematical certainty the amount of her contributions to the items of property held in joint tenancy at the death of decedent derived from her separate property or from compensation received by her for her personal services and efforts.

(Y) In determining and deciding that said Internal [217] Revenue Code, Section 811 (e) (2) requires that if the spouses convert their community ownership into a joint tenancy that the entire property be also taxed as part of the husband's estate.

(Z) In determining and deciding that said Regulation 105, Section 81.22, as amended, is a reasonable regulation and that it should be applied to the facts in the instant proceedings.

(AA) In determining and deciding that petitioner need show that the consideration furnished by surviving spouse for the joint property, which she

seeks to exclude from decedent's gross estate, was derived from compensation for personal services actually rendered by the surviving spouse or from her separate property.

(BB) In failing to recognize the effect of California Civil Code, Section 16a, on community property acquired, and in determining and deciding that the interest of petitioner in the community property came in some way from the decedent rather than as the result of the substantive law of California, which law the Federal Court must follow in matters where title to or interest in property is determined by the state law.

(CC) In failing to determine and decide that petitioner had sustained her burden of proof and had proved that at least one-half of all of the eight items of property was attributable to her separate property or to community property, which had been acquired as the result of her personal services. [218]

(DD) In determining and deciding that petitioner had failed to meet her burden of proof and had failed to show that Items 1 and 5 should be entirely excluded from the gross estate of decedent.

(EE) In determining and deciding contrary to the evidence and the findings of fact as to Item 1, 3 and 6, despite the clear Finding of Fact as to petitioner's contributions thereto, that there was no evidence that any part of the consideration for such items was derived from compensation for personal services actually rendered by the surviving spouse or from her separate property.

(FF) In determining and deciding that there had been a failure of proof as to Items 1, 3 and 6 and that an allocation could not be made thereof as between decedent and petitioner.

(GG) In failing to determine and decide that as matter of law that there was no other interpretation possible but that the burden placed on petition had been met, the evidence on each and every item being substantial and uncontradicted.

(HH) In disregarding the uncontraverted evidence of petitioner's activity in buying, selling, dealing in and managing real properties, both income and non-income, as contributing to the community property and to her separate property.

(II) In rendering a decision contrary to law.

(JJ) In rendering a decision contrary to its findings of fact.

(KK) In determining and deciding that petitioner was liable for the payment of a deficiency in the state tax of \$16,435.01, or any other sum, or any sum at all, because no notice was given to the Commissioner under Internal Revenue Code, Section 901 (a) or (b) in that it is shown by the records, in the official transcript of the proceedings before the Tax Court of the United States on June 21, 1946, Pages 65 and 66, that there was no Executor or Executrix nor is there such Executor or Executrix of the Estate of Joseph H. Heidt, deceased, nor was there any Will admitted to probate,

and that in the absence of any notice to the Commissioner under said Section 901 (a) or (b), the notice of deficiency was not properly given or addressed under Internal Revenue Code, Section 901 (d), and that it was not addressed in the name of the decedent or other person subject to liability and mailed to his last known address, nor was it addressed in the name of the decedent or other person subject to liability at all.

Petitioner claims that as the Federal Estate Tax Return (Form 706) was filed June 14, 1943, with the Collector of Internal Revenue for the Sixth District of California by his widow, Mrs. Louise Seeley, and that as by Internal Revenue Code Section 874 (a) the estate taxes must be assessed within three years after the return was filed, and that no proceeding in Court without assessments for the collection of such [220] taxes shall be begun after the expiration of three years after the return was filed; and further that by Internal Revenue Code, Section 900 (b) the period of limitations for assessment of liability against the transferee as fiduciary shall be one year after the expiration of the period of limitations for assessment against the executor. That, therefore, the statute of limitations has run as to assessing such deficiency.

Petitioner hereby designates the entire record as certified to the Clerk of the above entitled Court as necessary to be printed for the consideration of the points set forth above. Petitioner also designates

this statement of points and designation as necessary to be printed.

Dated: August 4th, 1947.

/s/ RALPH W. SMITH,

/s/ OLIVER O. CLARK,

/s/ L. A. LUCE,

/s/ JOHN MOORE ROBINSON,

/s/ ROBERT M. HIMROD,

Suite 917 Bank of America Bldg., 650 South Spring
Street, Los Angeles 14, California, Attorneys
for Petitioner. [221]

Acknowledgement of Service

Personal service of a copy of the foregoing Statement of Points is hereby acknowledged as having been made this 4th day of August, 1947.

CHARLES OLIPHANT, CAR

Acting Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

Filed T.C.U.S., September 24, 1947. [222]

The Tax Court of the United States

Tax Court Docket No. 5802

ESTATE OF JOSEPH H. HEIDT, Deceased,

LOUISE SEELEY, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

The petitioner hereby designates for inclusion in the record on review in the above entitled proceeding the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g) of Rule 75 of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of all proceedings before the Tax Court.
2. Pleadings before The Tax Court, including the Petition with the attached copy of the deficiency letter; also all other pleadings before the Tax Court.
3. The Findings of Fact and Opinion of The Tax Court.
4. The decision of the Tax Court.
5. The official transcript of oral testimony and

the whole thereof.

6. Joint Exhibits A-1 (Tax Form), and petitioner's Exhibit 2.
7. The Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit.
8. Notice of Filing of Petition for Review, together with Proof of Service thereof and of service of a copy of the Petition for Review.
9. This designation of contents of record on review.
10. Petitioners Statements of Points to be relied upon and designation of parts of record to be printed.

Dated: August 4, 1947.

/s/ RALPH W. SMITH,

/s/ OLIVER O. CLARK,

/s/ L. A. LUCE,

/s/ JOHN MOORE ROBINSON,

/s/ ROBERT M. HIMROD,

Suite 917 Bank of America Bldg., 650 South Spring
Street, Los Angeles 14, California, Counsel for
Petitioner.

Acknowledgement of Service

Personal service of a copy of the foregoing Designation is hereby acknowledged as having been made this 22nd day of September, 1947.

CHARLES OLIPHANT, CAR

Acting Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

Filed: September 24, 1947. [225]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 225, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 6th day of October, 1947.

[Seal]

VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11758. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Joseph H. Heidt, deceased, Louise Seeley, Executrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed October 16, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11758.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ESTATE OF JOSEPH H. HEIDT, Deceased; LOUISE SEELEY,
Executive,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

RALPH W. SMITH,

919 Oviatt Building, Los Angeles 14,

OLIVER O. CLARK,

710 Knickerbocker Building, Los Angeles 14,

JOHN MOORE ROBINSON,

ROBERT HIMROD,

917 Bank of America Building, Los Angeles 14,

Counsel for Petitioner.

R. A. LUCE,

Of Counsel.

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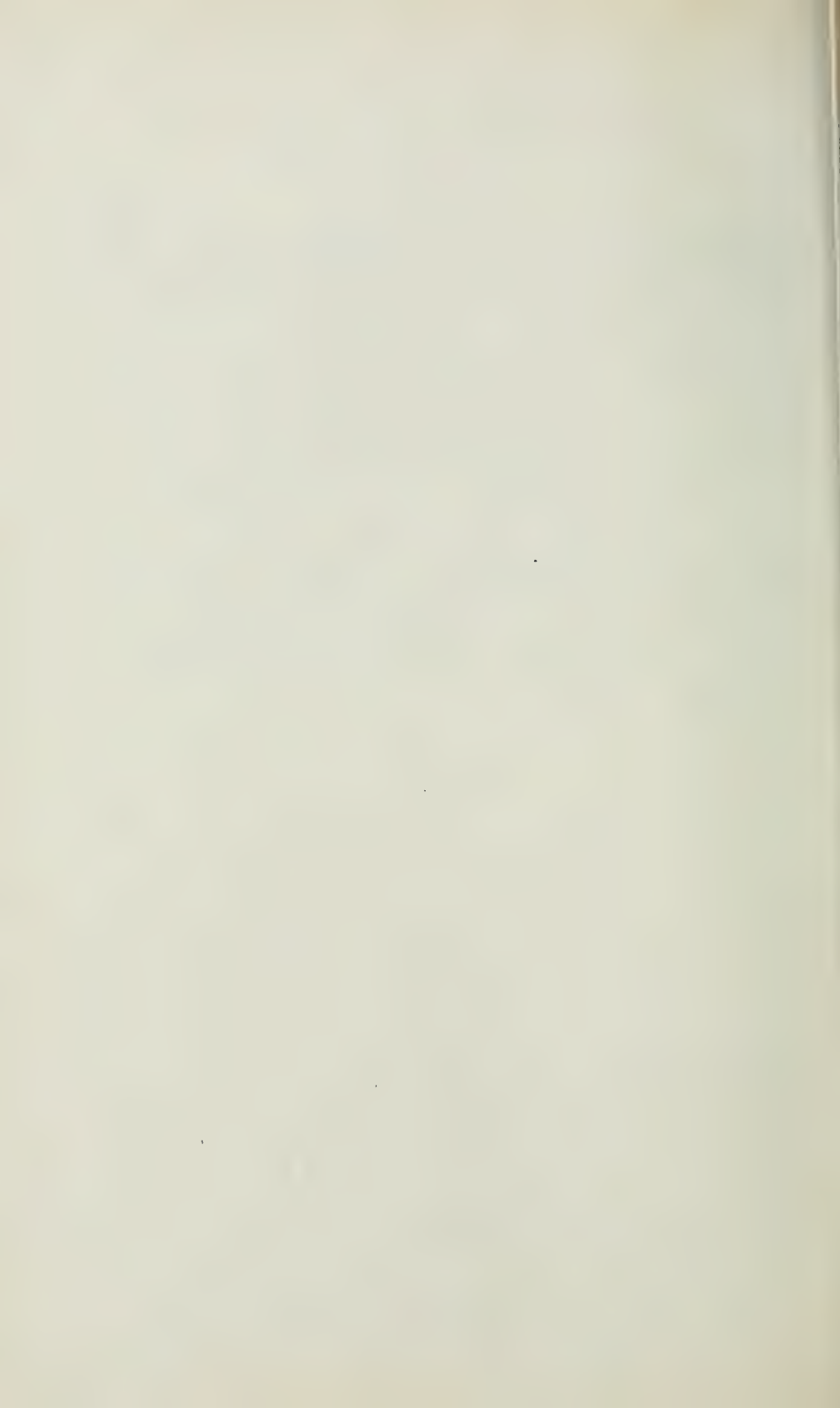
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No. 11758.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF JOSEPH H. HEIDT, Deceased; LOUISE SEELEY,
Executive,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

Opinion Below.

The facts as found by the Tax Court, and the opinions of the majority of the Tax Court and the dissent, are set out in full in the Record [pp. 15 to 33, incl.] and the attention of the Honorable Court is respectfully directed thereto.

Jurisdiction.

This is a review of a decision of the Tax Court of the United States involving federal estate taxes. The federal estate tax return was filed by petitioner, Louise Seeley [Record p. 159] with the Collector of Internal Revenue for the Sixth District of California on the 14th day of June, 1943 [Record p. 116].

The jurisdiction of the Tax Court of the United States below is based upon Section 871 of the Internal Revenue

Code. The petition to the Tax Court was filed with said Court on the 14th day of August, 1944 [Record p. 2], within the ninety day period allowed by Section 871 of the Internal Revenue Code after the mailing of the notice of deficiency on the 19th day of May, 1944 [Record p. 9]. Sections 1141 and 1142 of the Internal Revenue Code provide for the jurisdiction of the United States Circuit Court of Appeals and subsection 1141(b)(1) provides that this Honorable Court may review a decision of said Tax Court by reason of the fact that the Collector of Internal Revenue for the Sixth District of California is located in the Ninth Circuit. No stipulation designating any other Circuit or designating the United States Court of Appeals for the District of Columbia has been entered into by or between the Commissioner of Internal Revenue and the taxpayer.

Questions Presented.

1. Whether joint tenancy property purchased by husband and wife from vested community funds or from the proceeds of the sale of vested community property can be considered in the determination of the gross estate of decedent as having belonged, half to the surviving spouse and half to the deceased spouse, and never to have been received by the former from the decedent for less than an adequate and full consideration in money or money's worth.

2. Conceding for purposes of argument that the Tax Court correctly interpreted Internal Revenue Code, Section 811(e), whether petitioner had made sufficient showing that all or a portion of each item had come from her separate property or had originally been community prop-

erty acquired as a result of her personal efforts and had not been received or acquired by her from decedent.

3. Whether the Statute of Limitations bars assessment against the petitioner transferee.

4. Whether notice of deficiency was properly given or addressed.

Statutes and Regulations Involved.

Internal Revenue Code:

Sec. 811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(e) Joint and Community Interests—

- (1) Joint interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such prop-

erty was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

- (2) Community Interests—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Treasury Regulations 105:

Section 81.22 prior to T. D. 5239 C. B. 1943, P. 1085 provided:

“The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited or acquired in by gift, bequest, devise, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.”

Sec. 81.23 prior to T. D. 5239 C. B. 1943, P. 1085 provided in part:

“Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate.”

Sec. 81.22 as amended by T. D. 5239 C. B. 1943, P. 1085 (includes Sec. 81.22 as above). A portion of the added part is as follows:

“Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate . . .

. . . For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the meaning of the spouse and to the identification required, see section 81.23.”

Statement of the Case.

JOSEPH H. HEIDT died a resident of North Ridge, California, on November 22, 1942, at the age of ninety nine years and eleven days. The petitioner, Louise Seeley, formerly Louise Heidt, is his widow and since his death has remarried.

The said Louise Seeley duly filed the Federal Estate Tax Return (Form 706) on June 14, 1943, with the Collector of Internal Revenue for the Sixth District of California. The petitioner, the said Louise Seeley, as the widow of said decedent, is surviving joint tenant in the eight items involved in this controversy.

Respondent determined a deficiency, in estate tax against petitioner, in the sum of Sixteen Thousand Four Hundred Thirty Five and 1/100 (\$16,435.01) Dollars. This deficiency arose because respondent asserted that petitioner, in the gross estate of said decedent, should have included the full value of the aforesaid eight items of property held in joint tenancy instead of including only one-half of their value, as was done in the said Federal estate tax return.

Petitioner filed an appeal with the Tax Court of the United States.

The case was tried at Los Angeles, California, on June 21, 1946 before the Honorable Eugene Black, Judge of the Tax Court of the United States. The case was submitted on documentary evidence and oral testimony and briefs were filed by both parties. Under date of May 6, 1947, the Tax Court of the United States, by Judge Harlan, who did not hear the witnesses, promulgated its

Findings of Fact and Opinion after a review by the full Court of said opinion. Judge Murdock, in an opinion, dissented from the above decision, Judges Van Fossan and Leech concurring in the dissent. On May 6, 1947, the same day, the Tax Court of the United States entered its decision that there was a deficiency in estate Tax due from petitioner, in the amount of Sixteen Thousand Four Hundred Thirty Five and 1/100 (\$16,435.01) Dollars. Said decision is reported as 8 Tax Court No. 111. The evidence presented before the Tax Court consisted of the oral testimony of the petitioner, Louise Seeley, formerly Louise Heidt, widow of the decedent, and Ingall W. Bull, attorney for decedent and petitioner during the greater part of their married life. Judge Bull became attorney for them in approximately the year 1906 and continued as their attorney until he became a Judge of the Superior Court in Los Angeles County. Documentary evidence included the Federal Estate Tax Return, a Deed from the parents of petitioner to petitioner [Petitioner's Exhibit 2] and certain Deeds read into the record by counsel for petitioner [Record pp. 105 to 109, incl.]. The Federal Estate Tax Return was admitted as Petitioner's and Respondent's Joint Exhibit 1-A, and aside from the joint introduction of this exhibit Respondent offered no evidence, oral or documentary, whatever.

During the whole of their marriage, a period of fifty years, decedent and petitioner were residents of California, a community property state, and all of the said items

of property in controversy were acquired since the time of their marriage and all of said items of property were acquired after July 29, 1927, and therefore were "new type vested" community property.

The Court found that at the time of the marriage of decedent in 1893, decedent owned no real estate or personal property other than his personal effects, while petitioner had approximately \$1500.00 in money on hand [Record, pp. 16 to 18, incl.]. Petitioner gave decedent \$1000.00 to start in the produce business. This business was very successful, although due to market fluctuations decedent failed three times during his business career but never went into bankruptcy. Shortly after their marriage petitioner's parents gave her as a wedding present a Deed to a house and lot in Colton, California. This Colton house was traded for a store at Angel's Flight on South Broadway in Los Angeles and this store was sold and with part of the proceeds petitioner bought a lot in Boyle Heights upon which she built a four room cottage. In the construction of this cottage she received a gift from her father of \$400.00 and \$800.00 from her mother. Petitioner in this way entered into the real estate business after her marriage and was very successful in it. Part of the time she had a real estate license but most of the time she did not. She bought and sold various houses, hotels and apartments and rented and managed them and continued her real estate operations during the whole of her marriage.

At the death of decedent there were eight items of property held jointly by decedent and the surviving spouse, petitioner here. These eight items were reported under Schedule E of the Federal Estate Tax Return (with the exception of Item 5 which was excluded with the notation that "Decedent furnished nothing toward the acquisition of this item") and were included in the gross estate at one-half their value, petitioner claiming the remaining one-half interest therein [Record p. 18]. The Court made specific findings as to each of the eight items [Record pp. 19 to 21, incl.] The Court found that during their entire married life decedent supported his wife and paid all of their living expenses from his earnings [Record p. 17].

Statement of Points to Be Urged.

1. The Court should have held, as a matter of law, that petitioner showed that the source of all items was community property or the separate property of petitioner, that all of said community property was "new type" vested community property and that therefore petitioner had contributed at least one-half to each item.

2. The Court should have held that even though community property transferred into joint tenancy after October 21, 1942, might have to meet the tests of both Sections 811 (e) (1) and 811 (e) (2) of the Internal Revenue Code or be included at full value in the gross estate of decedent, that as all transfers herein were made before said date that such sections could have no retroactive effect and could not apply to the instant situation.

3. The Court should have held that as Section 81.22 of Treasury Regulations 105 was not amended until after the death of decedent, whatever force such amendment may have in supplementing and implementing the Internal Revenue Code does not apply to the instant case.

4. That petitioner met the burden of showing that at least one-half of items one, three, and six came from or was attributable to property to which the petitioner took title in her own name in writing, that by California law property taken thus is presumed separate and the burden of proof was thus met, there being no contrary evidence.

5. That petitioner did not, as a matter of law, fail to show that the items of real property were acquired as a result of petitioner's activities in the real estate business or from her separate property; that the bonds (item eight) were a gift to petitioner; and that at least one-half of the bank accounts (items six and seven) were funds acquired by petitioner from managing and dealing in real estate or were her separate property.

6. The Tax Court should have, even interpreting the law as it did, made an allocation in the case of items one, three, and six as the proportions attributable to petitioner were easy to identify and mathematical exactness is not a *sine qua non*.

7. That the Statute of Limitations bars assessment against petitioner *transfere*.

8. That the notice of deficiency was improperly given and addressed.

ARGUMENT.

Summary of Argument.

Petitioner showed conclusively that the consideration for all of the items held in joint tenancy came from the separate property of the surviving spouse or from community property. It is the contention of the petitioner that this showing is sufficient, under California law as it has existed since July 29, 1927, to show that the wife contributed at least one-half of the consideration for the jointly held property. Sections 811 (e) (1) and 811 (e) (2) of the Internal Revenue Code so provide, and it is only because of the issuance of a Treasury Regulation after the death of decedent, which in effect adds to the above cited sections, that any question as to the contributions of the survivor arises. It is the contention of petitioner that the regulations as amended are contrary to law, and that even if construed to be a valid supplementing and implementing of the Internal Revenue Code, that as the regulations were not amended until after the death of decedent, they cannot apply here.

Petitioner further contends that even conceding the validity and applicability of the Treasury Regulations that petitioner made sufficient showing that the real properties were acquired as a result of the personal efforts of petitioner in buying and selling, and in renting and managing real property and in erecting buildings thereon. The bank accounts were depositaries wherein the proceeds of the efforts of petitioner were deposited and constituted

a revolving fund which petitioner used for further real estate ventures.

In any event as mathematical certainty is not required in order that some allocation may be made to petitioner for the property attributable to her efforts, the Court should have made such allocation based on the findings it made, instead of refusing to make any allocation whatever.

Three years from the date of filing the return are allowed for assessing a deficiency against an estate and a further year thereafter to assess against a transferee or fiduciary. This period has passed without assessment against Louise Seeley, formerly Louise Heidt, the transferee herein.

The notice of deficiency was improperly given and addressed in that Louise Heidt was never executrix of the estate of Joseph H. Heidt, deceased, that notice given to her in such capacity was improper and void.

POINT I.

The Use of Community Property to Purchase Property, the Title to Which Is Taken in Joint Tenancy, Is the Use of Property Which Belonged One-half to Each Spouse and Which Never Was Acquired by the One From the Other for Less Than an Adequate and Full Consideration in Money or Money's Worth.

Decedent Joseph H. Heidt and petitioner resided within the State of California at all times from the time of their marriage in 1893 until the death of decedent on November 22, 1942 [Record pp. 115, 116 and 37]. Section 161a of the Civil Code of the State of California provides:

“The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Section 172 and Section 172a of the Civil Code. This section shall be construed as defining the respective interest and rights of husband and wife in the community property.”

In construing this section the case of *Cooke v. Cooke* (1944), 65 Cal. App. (2d) 260, 150 P. (2d) 514, said at pp. 265-266:

“ . . . The wife had a vested community interest in a portion of the policy which could not be taken from her without her consent.” (Citing cases.) “It should follow that plaintiff had a vested interest in that portion of the insurance purchased by community funds and that this interest was not ‘obtained from or through the other during the

marriage and in consideration or by reason thereof' but by purchase from community funds . . . that interest vested under the California statute and not through any gift from Stephen."

All of the items of property were acquired after July 29, 1927. Item five was acquired about 1932, or perhaps as late as 1936 [Record pp. 64 and 135]; the hotel building for which item five was received as payment was built before 1927 [Record pp. 46 and 132]. Item one was acquired in 1940 [Record p. 88]; item two some time between 1932 and 1936 [Record pp. 62 and 91]; item three in 1927 or 1928 [Record p. 91]; item four was purchased in 1939—petitioner testified that a ranch purchased in 1938 [Record p. 52] was kept approximately two years and then the El Camino property was purchased, decedent and petitioner lived there about a year [Record p. 53] and then purchased a ranch in San Fernando Valley [Record p. 54] (item one); item eight was acquired in 1941 [Record p. 65]; and items six and seven contained moneys received subsequent to 1927.

In the case of *Britton v. Hammell* (1935), 4 Cal. (2d) 690, 52 P. (2d) 221, where the husband made a deed of gift of community property, and the wife sued during the marriage to avoid the gift, the Court held that the gift was *void* and that the entire property should be restored to the community. The Court said (p. 693):

"Enough has been said to show clearly that the full measure of protection of the wife's rights during the existence of the community can only be

gained by restoring the entire property to the community. This being so, the prior cases limiting recovery to one-half are not inconsistent, because they all hold, in substance, that the wife's rights after death of the husband are fully protected by that limited recovery."

It is submitted that by any criteria of definition the share of the wife *originally belonged* to her. If such share is used in the purchase of joint tenancy property it meets the requirement of the Internal Revenue Code, Section 811 (e) (1) requiring the contribution of the survivor to be shown, and requiring that the contribution have originally belonged to the survivor and not have been acquired by such survivor for less than an adequate and full consideration in money or money's worth. As the wife's share never belonged to the decedent it could never have been acquired from him. It originally belonged to petitioner and has always belonged to her.

The Tax Court of the United States said in *Estate of Vandenhoeck v. Commissioner* (1944), 4 T. C. 125, 137:

"In our judgment the same result would obtain if we consider that the stock was owned and held by petitioner and the decedent as joint tenants, as contended by the respondent. Since it was purchased with community funds one-half the consideration was furnished by petitioner; therefore, only one-half of the value thereof is includible in gross estate under Section 811 (e), *supra*."

POINT II.

If Internal Revenue Code, Section 811 (e) (2), Is to Be Construed as a Gloss on Section 811 (e) (1), Such Operation Must Be Interpreted as Prospective, Rather Than Retrospective, in the Absence of a Clear Directive to the Contrary.

As all transfers herein made were made before the effective date of Section 811 (e) (2) of the Internal Revenue Code on October 21, 1942, the section that governs how the items of property are to be treated is Section 811 (e) (1), not Section 811 (e) (2). None of the items were community property on October 21, 1942, but had been, a long time previously, transferred into joint tenancy. In California a husband and wife can hold property in joint tenancy, in community or as tenants in common (Section 161, Civil Code). The interests of husband and wife in joint tenancy property are their separate property. *Siberell v. Siberell* (1932), 214 Cal. 767, 7 P. (2d) 1003. Section 811 (e) (2) applies to community property; these items had lost any community property characteristics long before the section was enacted. It is presumed, in the absence of clear and convincing evidence to the contrary, that the section was not intended to reach joint tenancy property that once was community. *Hassett v. Welch* (1938), 303 U. S. 303. Another question would be before the Court if the property was community at the effective date of the act and then a transfer was made to escape the rigor of Section 811 (e) (2).

POINT III.

As Section 81.22 of Treasury Regulations 105 Was Not Amended Until After the Death of Decedent It Does Not Apply to the Instant Case.

In brief, the effect of the amendment of Section 81.22 of Treasury Regulations 105 on March 10, 1943, by T. D. 5239 C. B. 1943, p. 1085, was to require that if community property was used to purchase property title to which was held in joint tenancy by the spouses, that the survivor would have to show that such joint tenancy property would meet the requirement of Internal Revenue Code Section 811 (e) (2) which requires that to exempt one-half of community property from federal estate tax that the survivor must show that he or she actually received such property, or the funds to purchase it, as compensation for personal services actually rendered by the survivor or from separate property of the survivor.

The language of the amended regulations goes far beyond Sections 811 (e) (1) and 811 (e) (2). On their plain language, the former is concerned with joint tenancy property and the latter with community property. Property should have to meet the tests and requirements of the *applicable* section, not of *both* sections, in order to be excluded from the estate of decedent.

If, granting for purposes of argument, that the amended regulation can have the force and effect of statute, it must be remembered that decedent died November 22, 1942, and the amendment to Treasury Regulations 105 did not take place until March 10, 1943, the date of the Cumulative Bulletin containing Treasury Decision 5239, at page 1085.

The rule of *Hassett v. Welch* (1938), 303 U. S. 303, *supra*, would definitely preclude its application to a case where the transfers were made and the decedent died before March 10, 1943.

POINT IV.

At Least One-half of Items One, Three and Six Came From, or Is Attributable to, Property to Which Petitioner Took Title in Her Own Name in Writing. Such Property Is Her Separate Property.

Petitioner proved that Nine Thousand and No/100 (\$9,000.00) Dollars of the consideration for the purchase of item one, the North Ridge Ranch, came from the Palm Springs property, title to which was in the name of petitioner [Record pp. 68, 89]. This replaced the money borrowed to make the original payment [Record p. 68]. The rest of the consideration was being paid in installments [Record p. 87]. The rule in California is that property, the downpayment for which is made from the funds of the wife, is separate, and community funds used to pay the balance lose their community character and become separate property of the *wife*.

Wedemeyer v. Elmer (1939), 33 Cal. App. (2d) 336, 91 P. (2d) 642;

Pacific Mutual Life Insurance Company v. Cleverdon (1940), 16 Cal. (2d) 788, 108 P. (2d) 405.

Item three consisted of two houses and two lots. Petitioner paid Fifteen Thousand and No/100 (\$15,000.00) Dollars for one of them and decedent paid Twelve Thousand (\$12,000.00) or Fourteen Thousand (\$14,000.00) Dollars for the other [Record pp. 69-70 and 91-92].

Item six, Twenty-one Thousand Nine Hundred Fifty-one and 37/100 (\$21,951.37) Dollars on deposit with the Bank of America, consisted of Ten Thousand (\$10,000.00) Dollars that was petitioner's own [Record p. 94]; the remainder came from the rents from apartments and buildings that petitioner managed [Record p. 71].

In each of these two petitioner showed a definite contribution from her separate property that should be apportioned in accordance with the provisions of Internal Revenue Code Section 811 (e) (2), conceding for the sake of argument, that such section has some applicability to the instant case.

POINT V.

At Least One-half of Each Item Was Shown to Be Attributable to Petitioner's Activities in the Real Estate Business Except for Item Eight Which Was Shown to Be a Gift to Petitioner From Decedent.

Item eight, Two Thousand and No/100 (\$2,000.00) Dollars in United States Defense Bonds, was a gift from decedent to petitioner [Record pp. 65-66]. The rest of the items were acquired as the result of petitioner's activities in buying and selling real property, in renting and managing such real property and in erecting buildings thereon [Record p. 100]. Item seven contained the rents from such properties [Record pp. 71 and 64]. Similarly for item six [Record p. 71]. Item five, the note secured by a trust deed, was in payment of the purchase price of the Elmo Hotel [Record pp. 71, 63-64]. Decedent handled the sale of the hotel [Record pp. 63-64] but petitioner testified that she built it with the proceeds of her separate property [Record pp. 46-47]. Petitioner, as soon as it was built, rented it to a Japanese [Record p. 47] which accounts for the fact that petitioner was not too well acquainted with its internal arrangements or the rents received for the rooms.

The case of *Richardson v. Helvering* (C. C. A., Dist. Col., 1935), 80 F. (2d) 548, said at p. 551:

“Admittedly, all the real estate in question was held jointly, and the evidence establishes that this holding was pursuant to an agreement between the parties made long prior to the enactment of any federal estate tax. Likewise the evidence shows that each of the parties contributed in money and services, from time to time, to the accumulation of a fund which was invested in real estate, which in turn was sold and the proceeds invested in other real estate, and so on, year after year, the title always passing to them jointly, and the properties, both in law and equity, belonging to them equally.”

The showing is much stronger here where it is clear that the properties were accumulated by petitioner's efforts in the real estate business rather than by the joint efforts of husband and wife in common enterprise.

Berkowitz v. Commissioner (C. C. A. 3rd, 1939), 108 F. (2d) 319, in commenting on the amount of proof required in various situations, said at p. 320:

“It is true that the old lady's testimony was vague. Whose wouldn't be after forty-three years?”

There the Court went on to reverse the Board of Tax Appeals and held that the share of profits received by the survivor in a jointly carried on grocery business would be money's worth in contributing to the purchase of joint tenancy property. Following and citing these cases is

Estate of Fletcher v. Commissioner (1941), 44 B. T. A. 429. It was held that as a contract between husband and wife to share profits was established, the surviving wife must be held to have contributed equally to the jointly owned property.

The Tax Court in *Estate of Neumann v. Commissioner* (1947), 9 T. C. (No. 146), considered the same problem where the parties were residents of Texas, a community property state. The circumstances are quite similar to the instant one. There the wife ran a boarding house. The Court recognized the contributions of the wife as coming from compensation for her personal services. The property, however, was community property rather than joint tenancy so the only question was as to whether the surviving wife met the test of Internal Revenue Code, Section 811 (e) (2). The Court held that she did in part. It is submitted that if the showing there was sufficient, it is in the instant case.

Similarly in a ruling of the Bureau of Internal Revenue, Office Decision (E. T.) 20, 1947-23-12687, it was indicated that if a wife worked in a store with her husband, that part of the community property accumulated could be shown to have been received by her as compensation for personal services actually rendered or derived originally from such compensation even though no definite salary was ever drawn by either.

POINT VI.

The Tax Court Should Have Allocated Items One, Three and Six Between Petitioner and Decedent, the Finding of the Tax Court Calling for Such Allocation—Mathematical Certainty Is Not Required Before the Court Must Act to Make Such Allocation.

The Tax Court found that definite contributions were made to items one, three and six [Record pp. 19-20]. However, the Court required a higher degree of proof in a community property state than it would have in a common law state. No reason would seem to require such an extra burden to be placed on petitioner. Despite the clear rule of *Siberell v. Siberell* (1932), 214 Cal. 767, 7 P. (2d) 1003, that property held in joint tenancy is the separate property of each spouse, the Tax Court treated it as if it were community property [Record p. 31]. It is submitted that the rule of *Cohan v. Commissioner* (C. C. A. 2nd, 1930), 39 F. (2d) 540, is the better. There, although petitioner was unable to show contributions with mathematical certainty, it was held that this was no reason to deny credit for them altogether. The Court said at pp. 543-544:

“In the production of his plays Cohan was obliged to be free-handed in entertaining actors, employees, and, as he naively adds, dramatic critics. He had also to travel much, at times with his attorney. These expenses amounted to substantial sums, but he kept no account and probably could not have done so. At the trial before the Board he estimated that he had

spent eleven thousand dollars in this fashion during the first six months of 1921, twenty-two thousand dollars between July first, 1921, and June thirtieth, 1922, and as much for his following fiscal year, fifty-five thousand dollars in all. The Board refused to allow him any part of this, on the ground that it was impossible to tell how much he had in fact spent, in the absence of any items or details. The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but there was basis for some allowance, and it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such. We think that the Board was in error as to this and must reconsider the evidence."

POINT VII.

The Statute of Limitations Bars Assessment Against Petitioner as Transferee or Fiduciary.

Internal Revenue Code, Section 874 (a), provides that assessment must be made within three years of the date the return was filed. The return was filed herein on June 14, 1943. Internal Revenue Code, Section 900 (b) (1), provides that one year thereafter is the period of limitation of assessment against a transferee or fiduciary. As there was no probate of the estate [Record p. 83], and as Louise Seeley, formerly Louise Heidt, was never the executrix, the notice of deficiency was improper and it is now too late to attempt to hold petitioner as transferee.

POINT VIII.

The Notice of Deficiency Herein Was Improperly Given and Addressed.

Notice of the deficiency should have been given and addressed to Louise Seeley, formerly Louise Heidt, as transferee. There was no such person as the executrix of the *Estate of Joseph H. Heidt*, as no probate was had [Record p. 83]. Therefore the liability of petitioner, if any, would be as transferee and no assertion of transferee liability was made, as noted above, within four years of June 14, 1943. Section 930 of the Internal Revenue Code provides that "executor" means executor, administrator, or person in actual or constructive possession of any property of the decedent but it does not authorize a deficiency to be asserted against a person in the capacity of executor if such person does not in fact exist. Liability was asserted against petitioner in a fiduciary capacity when it should have been as an individual.

Conclusion.

In conclusion, it is submitted, that the Tax Court erred:

First: In not recognizing that the wife's share of the community property is of equal rank with that of the husband in determining what consideration was contributed to joint tenancy property;

Second: If the Tax Court correctly interpreted the law, it erred in failing to credit petitioner with the clear showing made that the properties were the result of her efforts in the real estate business;

Third: The Tax Court erred in requiring mathematical certainty and exactitude before it would give credence to the proof that petitioner admittedly made of her contributions to items one, three, and six;

Fourth: It is urged that no proper notice was given to petitioner and that the time for assessment against her in her personal capacity has run.

It is therefore submitted that the decision of the Honorable Tax Court below is erroneous and should be reversed by reason of such errors.

Respectfully submitted,

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No. 11758

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

ESTATE OF JOSEPH H. HEIDT, DECEASED; LOUISE SEELEY,
EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

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WILLIAM P. GIBSON
CLERK

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*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 15-32), as well as the dissenting opinion (R. 33), are reported at 8 T. C. 969.

JURISDICTION

The Commissioner determined a deficiency in estate tax against the estate of Joseph H. Heidt, deceased, in the amount of \$16,435.01 and mailed notice of the deficiency to Mrs. Louise Seeley, the decedent's former wife (R. 16), as executrix of his estate (R. 9-13). On August 14, 1944, within the permitted ninety-day period, a petition for review was filed with the Tax Court for a redetermination of the deficiency under the provisions of Section 272 of the Internal

Revenue Code (R. 2, 4-13). A hearing was held on June 21, 1946 (R. 34), and the decision of the Tax Court, affirming the Commissioner's determination, was entered May 6, 1947 (R. 33). A petition for review by this Court (R. 165-185) was filed on August 4, 1947 (R. 4, 185), and properly invoked the jurisdiction of this Court under Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether petitioner has sufficiently shown that any part of the eight items of property held in joint tenancy by her and the decedent is excludible from the decedent's gross estate as property which originally belonged to her within the meaning of Section 811 (e) of the Internal Revenue Code.

2. Whether the case is affected by petitioner's contentions, made for the first time in this Court, that the notice of deficiency was improperly addressed to her as executrix of the decedent's estate and that the statute of limitations bars assessment against her as transferee.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 16-21) are as follows:

Joseph H. Heidt died on November 22, 1942, at the age of 99 years and 11 days. At the time of his death he was a resident of North Ridge, California. His widow, who remarried and became Mrs. Louise Seeley

prior to June 14, 1943, is the duly appointed and qualified executrix of his estate. She filed a federal estate tax return for the estate on June 14, 1943, as surviving joint tenant. (R. 16.)

The decedent and Louise Weise (now Louise Seeley) were married in 1893, at which time he was about 50 years of age and she was 18 years of age. At all times subsequent to their marriage they resided in the State of California until the decedent's death. (R. 16.)

At the time of their marriage the decedent owned no real estate or personal property, other than his personal effects, and after his marriage he did not acquire any property by gift, devise or inheritance except about \$1,000 which his wife gave him to start in business. (R. 16.)

The decedent, with the \$1,000 given him by his wife, started in the business of a dealer in produce. He started in a store at the Angel's Flight and then opened a small stall in Central Street Market. He specialized in potatoes and onions and became known as the "Potato King." He leased ground to plant potatoes and onions in California and Idaho. His business was successful and he made a great deal of money, but due to market fluctuations he went broke three times during his business career, but never went into bankruptcy. His business was speculative and he sometimes bought property and had the title put in the joint names of himself and his wife. Their bank accounts were also kept in their joint names. On several occasions he told his wife that if anything happened to him he wanted everything to go to her.

It was also understood that if anything happened to her everything would go to him. Decedent continued in business until 1934 when he retired at the age of 91. (R. 17.)

During their entire married life decedent supported his wife and paid all of their living expenses from his earnings. (R. 17.)

The decedent was never engaged in the real estate business. (R. 17.)

Shortly after her marriage, decedent's wife engaged in the real estate business and was very successful. She bought and sold real estate, built houses and apartment houses and hotels and furnished, managed and operated them. A part of the time she had a real estate license, but most of the time she did not. She had about \$1,500 when she was married. A part of this, approximately \$1,000 she gave to her husband to start in the marketing business. About two months after her marriage her parents gave her, as a wedding present, a deed to a house and lot in Colton, California. This Colton house was traded for a store at Angel's Flight on South Broadway, Los Angeles. This property was sold and with a part of the proceeds she bought a lot in Boyles Heights upon which she built a four room cottage. In the construction of the cottage she received a gift from her father of \$400 and \$800 from her mother. She subsequently sold the Boyles Heights property and bought a house on Washington Street. She sold this property and bought a place on Ruth Avenue, on which an old house was located. She moved the house and built Boyle Apartments. She furnished the apartment

house (12 apartments) and operated it for about four years, then sold the furniture and leased the building. She continued her real estate operations during her marriage with decedent. (R. 17-18.)

At the death of the decedent there were eight items of property held jointly by the decedent and his surviving spouse. These eight items were reported under Schedule E of the estate tax return and, with the exception of item five (which was excluded with the notation that "Decedent furnished nothing towards the acquisition of this item"), were included in the gross estate at one-half their value, decedent claiming one-half interest therein. (R. 18.) The following facts concerning these items appear in the record (R. 19-21):

ONE

This property, known as North Ridge Ranch, was bought by the decedent for approximately \$28,000 and held in joint tenancy by decedent. The down payment on the property was made with money which he borrowed from a friend. Decedent's wife then sold property, which she had acquired in Palm Springs, for \$9,000 and gave the money to the decedent to pay back the borrowed purchase money. The Palm Springs property which stood in her name originally consisted of a house and two lots which cost about \$4,500. Decedent's wife bought it with cash accumulated from different properties which had been sold and built two houses on the lots. The North Ridge Property was sold after decedent's death for \$30,000.

Two

This property, held in joint tenancy by decedent and his wife, consisted of two apartment houses located at Dunsmere and Eighth Streets in Los Angeles, California. It was acquired by the decedent for cash (derived from profits from different trades made by the decedent and his wife) about 10 or 12 years before the decedent died. It was sold after decedent's death for \$55,000.

THREE

This property, held in joint tenancy by decedent and his wife, consisted of two houses, one five-room and the other four room, on Sunset Place (or Sunset Park) acquired about 15 years before decedent's death. The decedent paid \$12,000 to \$14,000 for one property and decedent's wife paid about \$15,000 for the other with money acquired by working and accumulated from real estate transactions. The Property was sold after the decedent's death for \$18,000.

FOUR

This property, which was used by the decedent and his wife as a home for a time, is located on El Camino in Beverly Hills. It was acquired by the decedent, who took a mortgage on the property as security for a loan. The property was held by decedent and his wife as joint tenants.

FIVE

This property was located on Ruth Avenue and known as the Elmo Hotel. It was built by decedent, and first rented, then sold, by the decedent to a

Japanese who gave a joint promissory note to decedent and his wife secured by a deed of trust. Decedent's widow did not know the number of rooms or what its cost was.

SIX

The property involved in this item consisted of a joint bank account in The Bank of America in the amount of \$21,951.37, some of which was deposited by decedent and some by his wife. At the time of decedent's death approximately \$10,000 of the amount in the joint account had been deposited by decedent's wife. The money so deposited came from rents from different buildings and apartments. Decedent's wife deposited all the funds from the business transactions which she made in this joint account.

SEVEN

The property involved in this item was \$1,409.02 deposited in the California Bank, 9941 Wilshire Boulevard, Beverly Hills, to the joint account of decedent and his wife. The money was deposited by the decedent and came from the sale of different properties which had been accumulated.

EIGHT

The property involved in this item consisted of 20 United States defense bonds of a par value of \$2,000 which had been purchased by the decedent with his own funds. They were put in the joint names of decedent and his wife.

In computing the deficiency here in question the Commissioner included in the gross estate the full

value of all eight items of jointly owned property set out above. (R. 21.)

In addition to the jointly owned property which was reported in the estate tax return, the surviving spouse (decedent's wife) owned considerable property, both real and personal, which stood in her own name and was not included in the estate tax return. (R. 21.)

The Tax Court, after taking these findings into account, held that petitioner had failed to prove that any part of the value of the eight jointly held items was attributable to the wife's personal services or to the separate property of the wife and that, therefore, the entire value of all eight items is includible in the decedent's gross estate under Section 811 (e) of the Internal Revenue Code, as amended by the Revenue Act of 1942. (R. 22-32.) Three judges dissented as to items one, three, and six, stating that the findings showed that parts of those jointly held properties originally belonged to the wife as a result of her personal efforts and that an allocation could be made. (R. 33.)

SUMMARY OF ARGUMENT

1. Section 811 (e) (1) of the Internal Revenue Code imposes an estate tax on the entire value of property held in joint tenancy by the decedent and another, except such part as may be shown to have originally belonged to the surviving spouse, in this case the petitioner, and not to have been acquired by her from the decedent for less than an adequate and full consideration in money or money's worth. By virtue of paragraph (2) of the section, added by the Revenue Act of 1942 and effective as to decedents

dying after October 21, 1942, community property was no longer treated as belonging one-half to the surviving spouse; an exclusion was authorized of only such part as is shown to have been received as or derived from compensation for services rendered by the surviving spouse or from her separate property. Since the instant decedent died after October 21, 1942, this is the test to be applied in determining whether any part of the eight items of property jointly held by the decedent and petitioner, created from community property, is excludible from the decedent's gross estate. The applicable Treasury Regulations so provide and petitioner's objections to the interpretation of Section 811 (e) (1) in the light of the 1942 amendments and of the Treasury Regulations are without merit. Petitioner had the burden of proof in establishing an exclusion or exclusions under this test and, as the Tax Court held, she failed to sustain her burden of proving that any part of the properties held in joint tenancy was derived from compensation for services rendered by her or from her separate property.

Even if the test impelled by the 1942 amendments and the Treasury Regulations is ignored, petitioner has still failed to sustain her burden of proof. She contends that one-half of the value of the property held in joint tenancy is excludible from the decedent's gross estate on the ground that the joint tenancies were created with community funds, but she fails to distinguish between "old type" and "new type" community property. Since she had a mere expectancy in "old type" community property, one-half of such

community property was not property which belonged to her and therefore would not be excludible from the decedent's gross estate. She has not shown that any part of the jointly held properties was derived from "new type" community property; on the contrary, all signs point to the conclusion that the community property was "old type" community property, in which she had a mere expectancy at the decedent's death.

2. Petitioners contentions with respect to the deficiency notice and statute of limitations have no foundation in the record. They are based on assertions that there was no probate of the decedents estate and that petitioner was never the executrix of the estate. These assertions, made for the first time in this Court, are contrary to the admissions made by petitioner in the Tax Court.

ARGUMENT

I

Petitioner has failed to show that any part of the value of the eight items of property held in joint tenancy by her and the decedent is excludible from the decedent's gross estate as property which originally belonged to her within the meaning of Section 811 (e) of the Internal Revenue Code

At the time of the decedent's death, four items of real estate, one item consisting of a promissory note secured by a deed of trust, two items consisting of two bank accounts and one item consisting of twenty United States defense bonds were held in joint tenancy by the decedent and his wife. Section 811 (e) (1) of the Internal Revenue Code (Appendix, *infra*) requires the inclusion of a decedent's gross estate of

the entire value of property held in joint tenancy by the decedent and another—

except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *

The statute, whose constitutionality is not open to question¹ and which authorizes an exclusion from the decedent's gross estate only for such part of the jointly held property "as may be shown" to have originally belonged to the decedent's co-tenant, etc., places the burden of proof in establishing an exclusion upon petitioner. *Foster v. Commissioner*, 90 F. 2d 486, 488 (C. C. A. 9th), affirmed *per curiam*, 303 U. S. 618; *McGrew's Estate v. Commissioner*, 135 F. 2d 158 (C. C. A. 6th); *Bushman v. United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756. The Tax Court held that petitioner (the wife who held the properties jointly with the decedent and who remarried after the decedent's death and on the record (see *infra*) is the executrix of his estate) did not sustain her burden of proof and that therefore the entire value of the jointly held properties is includible in the decedent's gross estate. (R. 22-32.) Petitioner nevertheless contends that one-half originally belonged to her or was attributable to her within the meaning of the statute and that there should at least be an allocation as to items one, three and six.

¹ *United States v. Jacobs*, 306 U. S. 363; *Gwinn v. Commissioner*, 287 U. S. 224; *Tyler v. United States*, 281 U. S. 497.

The contentions will be answered below under appropriate headings.

A. A mere showing that community funds were used in the creation of the joint tenancies is insufficient to establish an exclusion under the statute and applicable Treasury regulations

As already shown, the exclusion under Section 811 (e) (1) of the value of property held in joint tenancy covers only that part which is shown "to have originally belonged" to petitioner, the decedent's cotenant, and never to have been received or acquired by her from the decedent for less than an adequate and full consideration in money or money's worth. Petitioner contends that one-half of the properties held in joint tenancy must be considered "to have originally belonged to" her on the ground that the joint tenancies were created with community property. (Br. 14-18.)

The contention may be correct *as to decedent's dying before October 21, 1942*. Prior to the passage of the Revenue Act of 1942, c. 619, 56 Stat. 798, the Internal Revenue Code contained no provision relating to the inclusion of the value of community property in a decedent's gross estate. Community property was therefore taxed one-half to each spouse for estate tax purposes. *Greenwood v. Commissioner*, 134 F. 2d 915 (C. C. A. 9th); *United States v. Pierotti*, 154 F. 2d 758 (C. C. A. 9th); cf. *Lang v. Commissioner*, 304 U. S. 264. As a result, in *Estate of Vandenhoeck v. Commissioner*, 4 T. C. 125, a case relied upon by petitioner (Br. 16) which involved the estate of a decedent who died in 1939, the Tax Court stated by way of *obiter dictum* that the surviving spouse had furnished

one-half of the consideration for the property held in joint tenancy, because the jointly held property was purchased with community property, and that therefore one-half of the value of the property held in joint tenancy would for that reason be excludible from the decedent's gross estate under Section 811 (e). The instant case, however, concerns the estate of a decedent who died on November 22, 1942, after the effective date of the 1942 amendments to Section 811 (e).

While the provisions of Section 811 (e) have remained the same since before the decedent's death and still grant an exclusion from a decedent's gross estate for that part of property held in joint tenancy which "originally belonged to" the decedent's surviving cotenant, Section 811 (e) was amended by the Revenue Act of 1942, *supra*, with respect to the ownership of community property for estate tax purposes. Section 402 (b) of the 1942 Act, *supra*, amended Section 811 (e) by changing the title of subsection (e) from "Joint Interests" to "Joint and Community Interests", by numbering as paragraph (1) the prior provisions of the statute relating to joint interests, and by adding paragraph (2) relating to community interests. These amendments became effective October 21, 1942, and are therefore applicable to the estate of the decedent, who died on November 22, 1942. Paragraph (2) of the statute, as added by the 1942 amendments (Appendix, *infra*), which has been held to be constitutional,² requires the inclusion in a decedent's

² *Fernandez v. Wiener*, 326 U. S. 340; *United States v. Rompel*, 326 U. S. 367.

gross estate of the entire value of property held as community property—

except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. * * *

The Ways and Means Committee report on the amendments (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 160 (1942-2 Cum. Bull. 372, 489)), states as follows:

This section [Section 402 of the 1942 Act] eliminates special estate tax privileges enjoyed by residents of community property jurisdictions by amending section 811 (e) of the Internal Revenue Code. * * * The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

The Senate Finance Committee report on the amendments (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231-232 (1942-2 Cum. Bull. 504, 673)), contains identical statements. See also, *Fernandez v. Wiener*, 326 U. S. 340. Thus, the amendments to Section 811 (e) made by the 1942 Act, both by their express language and according to the Congressional intent, required that community property no longer be treated as belonging one-half to the wife and one-half to the husband for estate tax purposes; only such community property as is shown to have been received as or derived from compensation for services rendered

by the surviving spouse or from the separate property of the surviving spouse is excludible from the decedent's gross estate as having belonged to the surviving spouse prior to the decedent's death.

Paragraph (2) of course relates only to property held as community property at the decedent's death, whereas in the present case community property had been converted into joint tenancies prior to the decedent's death, so that paragraph (1) of the statute, not paragraph (2), is directly applicable. However, since paragraph (2) provides the extent to which the surviving spouse's ownership in community property will be recognized for estate tax purposes as to decedents dying after October 21, 1942, it necessarily follows that the exclusion provided in paragraph (1) for property which "originally belonged to" the surviving spouse means, in the case of joint tenancies created with community funds, such part of the community property as is recognized by paragraph (2) as belonging to the surviving spouse. The statute, as well as the Congressional intent, requires such an interpretation, especially since Congress intended by the 1942 amendments to Section 811 (e) to eliminate special estate tax privileges enjoyed by residents of community property jurisdictions. Accordingly, the exclusion in Section 811 (e) (1) of that part of property held in joint tenancy which "originally belonged to" the surviving spouse includes, in a case where the joint tenancy was created with community property, only that part of the value of the jointly held property which was received as or derived from compensation for services actually rendered by the

surviving spouse or from the surviving spouse's separate property.

The pertinent Treasury Regulations contain a provision to that effect. Section 81.22 of Treasury Regulations 105, as amended (Appendix, *infra*), provides that—

For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, *such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived from such compensation or from such separate property of such spouse.* Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exceptions stated in the preceding sentence. * * * [Italics supplied.]

Petitioner's objections to the interpretation of Section 811 (e) (1) in the light of Section 811 (e) (2) (Br. 17) are without valid foundation. The 1942 amendments to Section 811 (e) are applicable to decedent's dying after October 21, 1942, and the instant decedent died after that date. The

fact that the transfers to joint tenancies occurred prior to October 21, 1942, is immaterial so far as the applicability of the amendments is concerned, both constitutionally and otherwise. The estate tax is laid on the ripening or shifting at death of incidents of property regardless of the ownership of the property, not on the transfer to a joint tenancy, and, accordingly, there can be no constitutional objection to the application of the 1942 amendments to transfers made before the effective date of the amendments in a case where, as here, the decedent died after the effective date of the amendments. See *Fernandez v. Wiener*, 326 U. S. 340; *United States v. Rompel*, 326 U. S. 367; *United States v. Jacobs*, 306 U. S. 363; *Gwinn v. Commissioner*, 287 U. S. 224. The statute itself recognizes no difference between joint tenancies created before and after the passage of the 1942 amendments so far as the estates of decedents dying after the effective date of the amendments are concerned. On the contrary, Section 811 (e) (1) requires, as it did prior to the amendments, that the surviving spouse's ownership in the jointly held property be determined on the basis of the *origin* of the property and the origin necessarily goes back beyond the time the joint tenancy was created and in some cases, as here, to a time before the passage of the amendments. While a determination in the present case of what constitutes property which "originally belonged to" the surviving spouse perhaps rests on a change in the recognition of ownership of community property, that change, made by the 1942 amendments, is constitutionally applicable to the es-

tates of decedents dying after October 21, 1942. *Fernandez v. Wiener, supra*; *United States v. Rompel, supra*. If petitioner is correct in stating (Br. 17) that "clear and convincing evidence" is required to show that Congress intended Section 811 (e) (1) to be interpreted in the light of Section 811 (e) (2), that evidence is found in the fact that paragraph (2) was made a part of the same subsection which had previously covered only joint interests and in the Congressional intent to eliminate special estate tax privileges enjoyed by residents of community property jurisdictions. Petitioner is of course contending for an interpretation of Section 811 (e) (1) which would frustrate that purpose in respect of joint tenancies.

Although that part of Section 81.22 of Treasury Regulations 105 which has already been quoted merely recognizes the required effect of the 1942 amendments in connection with a determination of what constitutes community property which "originally belonged to" the surviving spouse under Section 811 (e) (1), petitioner contends that the Regulations are inapplicable in the present case because they were promulgated after the decedent died. The promulgation of the Regulation was not of course the enactment of a new law; it merely interpreted Section 811 (e). The date of its promulgation is therefore no barrier to its applicability. Further, since it is reasonable as being consistent with the statute and the Congressional intent, it is valid. As the Supreme Court stated in *Commissioner v. South Texas Lumber Co.*, decided on March 29, 1948 (1948 P-H, par. 72,004):

This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. * * *

B. Petitioner failed to make the showing required by the statute and applicable Treasury regulations for the exclusion of any part of the value of the eight items

As we have already shown, under the statute and applicable Treasury Regulations that part of the eight items of property held by the decedent and petitioner in joint tenancy which "originally belonged to" petitioner and is therefore excludible from the decedent's gross estate under Section 811 (e) (1) consists of that part of the joint tenancy properties which is shown to have been received as or derived originally by petitioner from compensation for personal services rendered by her or from her separate property. The record does not support the conclusion, and petitioner does not contend, that the mere creation of any of the joint tenancies was intended as compensation to her for services rendered. Therefore, no part of the properties held in joint tenancy was "received" by petitioner as compensation for services rendered. It follows that the question here is only whether any part of any one or more of the eight items of joint tenancy was "derived from" compensation for personal services rendered by petitioner was "derived from" her separate property. In that connection, Section 81.23 of Treasury Regulations 105 (Appendix,

infra), to which reference is made in Section 81.22 of the same Regulations as being applicable under Section 811 (c) (1) of the Code, provides:

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. * * *

Petitioner contends that one-half of items one, three and six is excludible from the decedent's gross estate as being attributable to her own separate property (Br. 19-20, 23-24) and that one-half of all of the eight items except item eight is excludible as being attributable to her own activities in the real estate business (Br. 20-22). Neither contention is sufficiently supported by the record, we submit.

1. The evidence is insufficient to establish that any part of items one, three and six was derived from petitioner's separate property

As to item one, a ranch, petitioner assumes that the down payment was made with her own funds and asserts that the entire ranch was her separate property because the rule in California is that property becomes the separate property of the wife when the down payment is made from the funds of the wife and community funds are used to pay the balance. The argument overlooks the fact that title to the ranch was taken in joint tenancy and that, therefore, the ranch

itself could not have become petitioner's separate property. In any event, the California rule is unavailable to petitioner, for the 1942 amendments to Section 811 (e) were specifically designed to make presumptions under State law inapplicable. H. Rep. No. 2333, *supra*; S. Rep. No. 1631, *supra*; Treasury Regulations 105, Sec. 81.23.

Nor has petitioner shown any reason for an allocation as to item one. She asserts that the down payment was made with her own funds, but the findings of the Tax Court (R. 19) do not establish that as a fact. The Tax Court found that the down payment was made by the decedent with borrowed funds and that petitioner sold the Palm Springs property for \$9,000 and gave the \$9,000 to the decedent to repay the loan. The \$9,000 is attributable to petitioner only if it was derived *originally* from separate property of petitioner and under the express language of Section 811 (e) (1) this requires a showing that the Palm Springs property, from which the money was obtained, was not acquired by petitioner from the decedent for less than an adequate and full consideration in money or money's worth. As the Tax Court found (R. 19) from petitioner's testimony (R. 54, 89), the Palm Springs property was purchased with cash accumulated from the sale of different properties. Petitioner has altogether failed to trace the property back to any property which originally belonged to her as her separate property. Thus, this is a case where there is no reason shown for an allocation, not a case where, as in *Cohan v. Commissioner*, 39 F. 2d 540 (C. C. A. 2d), the taxpayer showed a

reason for an allocation but no basis on which it could be made.

At to item three, petitioner claims that an allocation should have been made by the Tax Court on the ground that she paid for one of the houses covered by the item. (Br. 19.) The fact that she paid for the house does not establish that it was her separate property. The pertinent inquiry is what funds she used in payment and on this point the Tax Court's findings (R. 19-20) based on petitioner's testimony (R. 69-70, 92) are that the money was acquired by working and accumulated from real estate transactions. The latter may or may not have been exchanges of petitioner's separate property. Petitioner has not shown that they were.

As to item six, petitioner states that \$10,000 in the joint bank account covered by the item was her own. (Br. 19.) The Tax Court found (R. 20-21) on the basis of petitioner's testimony (R. 71) that the money in the account came from rents from different buildings and apartments. On the crucial question—whether the rents were from buildings and apartments which were petitioner's separate property—petitioner has offered no proof.

In considering the evidence, there are two reasons why no inferences should be drawn in petitioner's favor. First, there is the fact that the inferences are for the Tax Court, which made the most favorable findings possible for petitioner on the evidence but found itself unable to draw any of the ultimate inferences necessary to sustain her position. Second, there is the fact that, while petitioner received some

separate property from her family in 1893 and subsequently worked and conducted real estate transactions, at ~~petitioner's~~ ^{decedent's} death, as the Tax Court found (R. 21), petitioner owned "considerable" property, both real and personal, which stood in her own name and was not included in the estate tax return. Since the Tax Court found that the decedent also had a very successful business of his own and made a great deal of money (R. 17) and the evidence and findings of the Tax Court show that all five items of real estate involved here (including the property which secured the promissory note) were purchased by the decedent, not petitioner, it is a permissible and logical inference that the properties which stood in petitioner's own name at the decedent's death were the only properties which were derived by petitioner from the combination of her labors in the real estate field and the profits and income from exchanges of her original separate property.

2. The evidence is insufficient to establish that one-half of items one to seven, inclusive, was derived originally by petitioner as compensation for services rendered

It is unquestionable, of course, that petitioner received some compensation during her marriage in connection with her real estate activities. It does not follow, however, that the Tax Court was required to assume that such compensation found its way into any of the items which were held in joint tenancy at the decedent's death. The five items of real estate involved here were purchased by the decedent, not petitioner, and, as already stated, it is a reasonable conclusion that the compensation which

petitioner derived from her real estate dealings was reflected in the "considerable" property (R. 21) which she held in her separate name at the decedent's death.

It should be noted that petitioner admits that as to the United States defense bonds, item eight, the joint tenancy was a gift to her from the decedent. (Br. 20.) This necessarily is a concession that the entire value of item eight is includible in the decedent's gross estate.

C. Even if the test required by the statute and applicable Treasury regulations were not applied, the evidence would be insufficient to show that any part of the properties held in joint tenancy originally belonged to petitioner

The Tax Court's decision is correct, we submit, even if no reliance is placed upon the pertinent Treasury Regulations and 1942 amendments to Section 811 (e). Petitioner's burden would still be to show that some part of the jointly held properties "originally belonged to" her and ~~were~~ not acquired from the decedent for less than a full consideration in money or money's worth. Thus, while the joint tenancies may have been created with community property, that fact does not establish that one-half of the jointly held properties belonged to petitioner unless one-half of the community property "originally belonged to" petitioner. She has not shown that it did.

In arguing that one-half of the eight items of jointly held property originally belonged to her as having been created from community property, petitioner ignores the two types of community property which exist in California and erroneously assumes (Br. 15) that the mere fact that these eight items of

property were acquired after July 29, 1927, is sufficient to establish that the properties were acquired with community property in which petitioner had a present, existing and vested right. However, as this Court stated in *Rogan v. Delaney*, 110 F. 2d 336, 337, certiorari denied, 311 U. S. 660:

Formerly, in California, the wife's interest in community property was not a present existing interest, but was a mere expectancy, * * * How, by § 161a of the Civil Code (added by Stats. 1927, c. 265, p. 484, effective July 29, 1927), it is provided: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband * * *." *But § 161a does not apply to community property acquired before July 29, 1927, * * *; nor to property received in exchange for or purchased with the proceeds of such community property, * * *; nor to income derived therefrom, * * *.*

Thus, in California, there are two types of community property: (1) Community property in which the wife has a present existing interest and (2) community property in which the wife has no such interest. * * * [Italics supplied.]

See also, *Gump v. Commissioner*, 124 F. 2d 540 (C. C. A. 9th), certiorari denied, 316 U. S. 697. It is obvious of course that the California "old type" community property, in which the wife had only a mere expectancy, cannot be considered property one-half of which "originally belonged to" the wife. Cf. *United*

States v. Malcolm, 282 U. S. 792, and *Rogan v. Delaney, supra*, in which it was held that the entire income from "old type" community property is taxable to a California husband. It follows, necessarily, that petitioner's contention that one-half of the value of the eight items of joint tenancy "originally belonged to" her as community property requires, as a basis for consideration of the argument, a showing that the eight joint tenancies were not created with "old type" community property, that is, community property which had its derivation in community property acquired prior to July 29, 1927.

Petitioner has failed to make such a showing. None of the eight items of property held in joint tenancy were traced to "new type" community property. On the contrary, the findings of the Tax Court, which petitioner does not dispute, affirmatively reflect that the community property involved was "old type" community property. First of all, there is the over-all picture portrayed by the evidence and findings of the Tax Court. After their marriage in 1893 the decedent and petitioner both carried on separate and successful businesses, but by July 29, 1927, they had been married for 34 years and the decedent was then 84 years of age and petitioner 52 years of age. The decedent retired from business in 1934 at the age of 91. While the decedent and his wife apparently did not altogether stop purchasing property until shortly before the decedent's death in 1942, it is only logical to conclude that most, if not all, of the community property held by the decedent and his wife after July 29, 1927, had its derivation in, and there-

fore was, "old type" community property in which petitioner had only a mere expectancy, not a one-half present and vested ownership. Further, it is significant that some of the real estate properties held in joint tenancy were acquired before the decedent retired in 1934. For example, the Tax Court found (R. 19) that, as petitioner testified (R. 61-62, 90-91), item two, consisting of two apartment houses, was acquired 10 or 12 years before the decedent died, and thus in 1930 or 1932, and that the properties were acquired with cash derived from profits from previous trades made by decedent and his wife. As to item three, the Tax Court found (R. 19-20) from petitioner's testimony (R. 91) that the purchase was made about 15 years before the decedent died, and thus in 1927, with money acquired by working and accumulated from real estate transactions. The property which secured the promissory note covered by item 5 was stated by petitioner to have been built by the decedent about 14 years ago (R. 64) which, since the hearing before the Tax Court was in 1946 (R. 34), would have been in 1932.³ Thus, all signs point to the conclusion that the community property involved was "old type" community property and, accordingly, was not property one-half of which belonged to petitioner. In any event, petitioner has failed to trace any of these jointly held properties to "new type" community property.

³ Petitioner's testimony does not show when item four was acquired. Item one may have been acquired in 1940 (R. 88), although the Tax Court did not so find.

II

Petitioner's contentions with respect to the notice of deficiency and statute of limitations are without basis in the record

Petitioner contends that the notice of deficiency was improperly addressed to her as executrix of the decedent's estate; that, while she was liable for the estate tax on the decedent's estate as transferee, there has been no assertion of liability against her as transferee; and that the statute of limitations bars assessment against her as transferee. (Br. 25.) If these contentions are intended to raise a jurisdictional question, they do not have that effect, for the contentions are based on assertions that there was no probate of the decedent's estate and that petitioner therefore was never the executrix of the estate—assertions which are contrary to the record made by petitioner in the Tax Court.

At the hearing before the Tax Court Mr. Clark, petitioner's counsel (R. 34), stated that he was willing to stipulate that the estate had been probated and explained the technical manner in which an estate may be probated in California (R. 83). Further, petitioner's petition for review filed in the Tax Court alleged that (R. 4)—

1. Petitioner, Louise Seeley, is the duly appointed, qualified and acting executrix of the Estate of Joseph H. Heidt, deceased.

and no question was ever raised in the Tax Court by petitioner as to her status as executrix of the decedent's estate. She plainly is in no position to raise the question for the first time in this Court on a record which not only fails to contain evidence to support her

position but shows that she admitted by affirmative allegation in her pleading that she was the executrix of the estate.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

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Special Assistants to the Attorney General.

MAY 1948.

APPENDIX

Internal Revenue Code.

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(e) [as amended by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Joint and Community Interests.*

(1) *Joint interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance,

as a tenancy, by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the proeprty by the number of joint tenants.

(2) *Community interests*.—To the exent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. (26 U. S. C. 1940 ed., Sec. 811)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.22 [as amended by T. D. 5239, 1943 Cum. Bull. 1081].

Property held jointly or by the entirety.—The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the rights of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the

decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 811 (e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms as part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

The entire property is *prima facie* a part of the decedent's gross estate. But it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner should neither have parted with any consideration in its acquirement. Facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) If the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) If the property, or a part

thereof, or a part of the consideration where-with it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than an adequate and full consideration in money or money's worth, then such portion of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) If the property was acquired by the decedent and his or her surviving spouse as tenants by the entirety by gift, bequest, devise, or inheritance, then only one-half of the property becomes a part of the gross estate. (5) If the property was acquired by the decedent and the other joint owner as joint tenants by gift, bequest, devise, or inheritance, and their interests are not otherwise specified or fixed by law, then only one-half of the property is a part of the gross estate; or, if so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall be deemed the owners of equal fractional parts, and one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) If the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) if the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) if the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire property should be included; (d) if the other joint owner, prior to the acquirement of the property, received from the decedent, for less than an ade-

quate and full consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) if the decedent furnished no part of the purchase price, no part of the property should be included; (f) if the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the property should be included.

For the purposes of the estate tax, a relinquishment or promised relinquishment of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the mean-

ing of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

SEC. 81.23 [as amended by T. D. 5239, 1943 Cum. Bull. 1081].

Community property.—In the case of estates of decedents dying after October 21, 1942, the gross estate includes the entire community property held by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. Section 811 (e) (2) also provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner. The burden of identifying the property which may be excluded from the community interest rests upon the executor.

As to the inclusion of transfers of community property during life, see section 81.15, and for treatment of life insurance acquired with community property, see sections 81.25 and 81.27.

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No. 11758

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ESTATE OF JOSEPH H. HEIDT,

Deceased,

LOUISE SEELEY, Executive,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

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Of Counsel.

JUN 5 - 1948

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No. 11758

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ESTATE OF JOSEPH H. HEIDT,

Deceased,

LOUISE SEELEY, Executive,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

Summary.

Property held in joint tenancy on October 21, 1942, is not affected by Internal Revenue Code, Section 811(e) (2). The amendment is prospective not retrospective as no retrospective application was set forth in the Statute or elsewhere indicated. Petitioner, if her interpretation of Internal Revenue Code, Section 811(e)(1) is correct, need not also prove the contributions of petitioner to the community funds from compensation for her personal

services. Decedent did not deal in real estate, but the items were purchased by Petitioner or by decedent and Petitioner together, each contributing funds to such purchase. Furthermore Petitioner was highly successful in the real estate business while decedent failed three times, though he never went into bankruptcy and did manage to pay all the family living expenses. Thus petitioner has shown the required contribution to the community, if Internal Revenue Code, Section 811(e)(1) is interpreted to require such showing.

ARGUMENT.

POINT I.

No Reason Appears Why Joint Tenancy Property Should Be Affected by the Amendment of the Law Relative to Community Property.

If at the time that the amendment to Internal Revenue Code Section 811(e) was passed property was held in joint tenancy, an amendment applying to community property would not affect it. As has been pointed out in Petitioner's Opening Brief (Ptr. Br. pp. 17 and 23) in California the law is that in the case of property held in joint tenancy, the interests of each tenant are separate property, not community. If then, such property had been purchased with community funds the effect of such transaction must be measured by the law applicable at that time which recognized the "present existing and equal" interests of both spouses in community property. It is unquestioned that before Section 811(e)(2) was added to

the Internal Revenue Code that the use of community funds to purchase joint tenancy property established the equal contributions of the spouses to it.

Here Respondent is attempting to show that Section 811(e)(2) reaches back retroactively and fastens on property that had lost its character as community property long before. How a law relating to community property could affect property that had not been community property for several years is not apparent. Respondents only hope of showing the applicability of Section 811(e)(2) to matter beyond its scope is to treat the section as if it read that it was to apply to community property *and* to all property that ever had been community property. The fallacy of this is apparent if one considers what the effect would be if this doctrine were used in a situation where community funds were used to buy property, title to which was taken in tenancy in common. Is the whole of such property to be taxed to the decedent tenant on the death of one of the tenants? Patently not. The tax situation is determined at the time of death and how such property is to be taxed is determined by rules governing such property. If the law requires that the source of property be traced, it is done in the light of the law applicable to that kind of property, not in the light of other rules concerning another type of tenancy. Particularly is this so when the rules as here were not in existence during any of the time that the property was community property.

POINT II.

If Community Property Transferred Before October 21, 1942, Must Meet the Tests of a Later Statute Then the Transfer Is Taken as the Taxable Event and the Retroactive Application of the Statute Should Have Been Clearly Directed by Congress.

Respondent has spent considerable time asserting the proposition that unless Sections 811(e)(1) and 811(e)(2) of the Internal Revenue Code are interpreted in accordance with Treasury Regulations 105, Section 81.22 (as amended by T. D. 5239, 1943 Cum. Bull. 1081) opportunity will be afforded for tax avoidance. Whatever merit this argument might have to transfers on October 21, 1942, or thereafter, or more specifically, to transfers on or after March 10, 1943, the date of Cumulative Bulletin containing T. D. 5239 shall argument lose any force it might have when applied to joint tenancy property acquired before October 21, 1942.

No one made a transfer of community property into joint tenancy before 1942 to achieve such a result. It must be remembered that no foreseeable tax advantages could have accrued at the time the transfers were made, as Community Property was taxed one-half to the decedent spouse just as in the case of property held in joint tenancy.

Therefore any purpose imputed to Congress that Congress was trying to reach such transactions retroactively, to correct an avoidance taking place before the 1942 Revenue Act was passed should have been indicated clearly.

Otherwise the normal prospective application must be given. This is most consistent with the interpretation that the Revenue Act of 1942 and T. D. 5239 of March 10, 1943, were designed to prevent the shifting of Community Property to joint tenancy as a result of the passage of the act. Whether such measures were effective or not is beside the point here, as we are dealing with property that lost its Community character long prior to 1942.

POINT III.

Petitioner Need Not Meet Both the Burden of Pointing Out the Incorrectness of Section 81.22 of Treasury Regulations 105, as Amended, and of Proving the Contribution of the Survivor by Means of Personal Services to Half of the Community.

Respondent asserts that Petitioner must meet the requirements of Section 81.22 of Treasury Regulations 105, as amended even though she has shown such regulation to be erroneous. The very reverse is the case, for if Petitioner's interpretation of Internal Revenue Code, Section 811(e)(1) is correct, the task of Petitioner is at an end and further inquiry is of no purpose whatever. Only if the validity of this regulation is upheld is it necessary to inquire further and to determine if the situation meets the requirements of Section 81.22. The dissenters in the Tax Court, as has been pointed out, thought such burden had been met by Petitioner in the case of items one, three, and six. Petitioner has pointed out in her Opening Brief how such burden has also been met for the other items.

POINT IV.

The Items of Real Estate Were Not Purchased by Decedent as Asserted by Respondent but Were in Some Cases Purchased Jointly and in Others by Petitioner.

Respondent asserts that the evidence and findings of the Tax Court show that items one, two, three, four and five were all purchased by decedent. (Resp. Br. p. 23.) Respondent attempts to show thereby that Petitioner made no contribution thereto. In the first place, the inferences attempted to be drawn are purely in the realm of speculation, and, secondly, this is not the case. Item one was in truth and fact purchased by Petitioner, her funds as soon as made available going to make up the down payment. [Record p. 19.] Then, as to item two, the Tax Court indicated that the purchase, though nominally made by decedent, was made from funds of both spouses. [Record p. 19.] Again in the case of item three the court sets forth that decedent bought one house and Petitioner the other. [Record p. 20.] Item four was bought by Petitioner [Record p. 53] although the Tax Court found that decedent acquired it. Such finding was erroneous in view of the uncontradicted testimony of Petitioner. Item five, the note and trust deed, covered a hotel built by Petitioner [Record pp. 46-47] and rented immediately thereafter to a Japanese. Later it was sold to the Japanese and a note and trust deed taken. [Record pp. 63-64.] Decedent merely handled the sale and the execution of the trust deed.

POINT V.

Where the Personal Services of the Wife Gave Rise to the Community Property It Is Not Necessary to Inquire as to Whether It Is “New Type” or “Old Type” Community Property as Petitioner Asserts in Pages 24 to 27 Inclusive of Respondent’s Brief.

When, as here, the wife engaged in one business, that of buying, selling, trading, renting and managing real property, and the husband engaged in the sometimes highly profitable, sometimes disastrous, calling of commission merchant and wholesaler of produce, Petitioner has shown her monetary contribution to the family exchequer by showing such business enterprise and inquiry as to the type of community property is irrelevant. Here Petitioner maintained a revolving fund in which the proceeds of her efforts in the real estate field were deposited and which was used for new ventures. The only one interested in whether such property was “new type” or “old type” was decedent, who lost certain powers over one-half community property in 1927. Basically his rights were not changed as they would not ripen-free of restrictions until the dissolution of the community by death or divorce. The interest of the wife “while it has not yet reached the status of a vested interest” is “a much more definite and present interest than that of an ordinary heir.” (*Stewart v. Stewart* (1926), 199 Cal. 318, 249 Pac. 197.) But even if decedent did have greater rights before 1927 than thereafter he must be deemed to have waived them for the reason that he allowed petitioner to commingle “old” and “new” types of community property in the same

revolving fund. Whatever greater rights the husband had in "old type" property that could not be abridged (see *Trimble v. Trimble* (1933), 219 Cal. 340, 346, 26 P. (2d) 477), such rights could be waived as was done here.

Furthermore, it must be pointed out that Petitioner was highly successful in the real estate business while decedent failed three times. Though decedent never went into bankruptcy, he had to pay large debts. In addition he paid all of their living expenses. Thus it is logical to assume that what remained after eight years of retirement was merely his share of the money on deposit in the bank accounts. Petitioner continued in her real estate business after his retirement in a period of increasing activity and a rising market. Therefore it can be inferred that what property they had at decedent's death came largely from Petitioner's efforts.

Conclusion.

Therefore, it is submitted, that for the reasons set forth in Petitioner's Opening Brief and in the foregoing, the decision of the Honorable Tax Court below is erroneous and should be reversed.

Respectfully submitted,

RALPH W. SMITH,
OLIVER O. CLARK,
JOHN MOORE ROBINSON,
ROBERT M. HIMROD,

By JOHN MOORE ROBINSON,
Counsel for Petitioner.

L. A. LUCE,
Of Counsel.

No. 11758.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF JOSEPH H. HEIDT, Deceased; LOUISE SEELEY,
Executrix,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF LEON B. BROWN AND JOHN W.
ERVIN AS AMICI CURIAE.

LEON B. BROWN,

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Amici Curiae.

FILED

SEP 4 - 1948

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IN THE

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF LEON B. BROWN AND JOHN W. ERVIN AS AMICI CURIAE.

Leave of Court having first been obtained, the undersigned, appearing as *amici curiae*, present herewith the following brief in support of the petitioner on this appeal.

The 1942 Amendment to Section 811(e) of the Internal Revenue Code Did Not Change the Taxable Portion of Joint Tenancy Property Theretofore Acquired With Community Funds.

It appears to be undisputed that the properties held by the decedent and the petitioner as joint tenants were all acquired prior to the effective date of the Revenue Act of 1942, and it is assumed, as petitioner contends, that at least a portion of the funds used to acquire these properties consisted of community funds in which the decedent and the petitioner each had a vested one-half interest under

Section 161a of the California Civil Code. Under such circumstances, there can be no doubt that under Section 811(e) as it read prior to the 1942 amendments it would have been necessary to exclude from the gross estate of the decedent that portion of the joint tenancy property which was derived from the petitioner's one-half interest in the community funds. (*Estate of Paul M. Vandenhoeck*, 4 T. C. 125, 137.) This was so because the words "originally belonged to" in Section 811(e) established *ownership* as the test of exclusion, and ownership depends entirely upon state law. In California, under Section 161a, the wife's interest in community property is a "present, existing and equal" interest which has been held to be a vested interest for estate tax purposes.

United States v. Goodyear, 99 F. (2d) 523;

Bank of America v. Rogan, 33 Fed. Supp. 183.

Section 402(b) of the Revenue Act of 1942 added to Section 811(e) a new paragraph dealing with property held at the date of death as community property, but made no change in the language of the preceding paragraph dealing with property held in joint tenancy. Joint tenancy property is, of course, not community property, even when acquired by husband and wife with community funds.

Siberell v. Siberell, 214 Cal. 767, 7 P. (2d) 1003.

Notwithstanding the failure of Congress to make any change in the statutory provision expressly relating to joint tenancy property, the Commissioner on March 10, 1943, by T. D. 5239, amended Section 81.22 of Reg. 105, to provide, in effect, that in estates of decedents dying after October 21, 1942, joint tenancy property purchased with

community funds should be taxed as if it were community property. Now, it is obviously beyond the power of the Commissioner of Internal Revenue to change the law. (*Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 80 L. Ed. 528, 531; *Estate of Louis Stockstrom*, 7 T. C. 251, 254.) The regulation can be sustained only if the change was made impliedly by Congress itself.

The brief of respondent attempts to sustain the regulation by asserting in effect that Congress in 1942 established a new rule of ownership of community property for all estate tax purposes. Had Congress intended to do this, how simply it could have been done! It was necessary only to insert in Chapter 3 of Subtitle A of the Code one short section providing that "for the purposes of this chapter" community property should be treated as the property of the decedent, with certain exceptions. But Congress did *not* enact any legislation so broad or sweeping in scope. Instead, it dealt separately and specifically with property held at death as community property (Section 811(e)(2)), with taxable *inter vivos* transfers of community property (Section 811(d)(5)), and with life insurance purchased with community funds (Section 811(g)(4)). Congress apparently intended to limit the community property revisions to these particular subjects.

Even in connection with these three particular revisions Congress did not fail to recognize the wife's vested interest in community property. In each case the community property was referred to as held "by the decedent and surviving spouse," but it was provided that such community property, with certain exceptions, should be taxed *as if* held by the decedent alone.

It is especially significant that in dealing with proceeds of life insurance, the taxability of which depended on the ownership of the funds used to pay the premiums, Congress expressly provided in Section 811(g)(4) for cases in which premiums were paid from community funds, but that in considering joint tenancy property, the taxability of which also depended on the ownership of the funds or other property with which it was acquired, Congress made no provision for cases in which the property was acquired with community funds. Its failure to legislate on this latter subject can hardly have been accidental. Perhaps the members of Congress sought a closer correlation of the rules applicable to joint tenancy property and property held in common, for there is no apparent reason why jointly owned property acquired with community funds should be taxed in its entirety, while property acquired with community funds by husband and wife as tenants in common is taxed only to the extent of one-half.

The principal argument of the Commissioner in support of the regulation under discussion is that it is necessary to prevent tax avoidance by conversions of community property into joint tenancy. This argument, however, completely fails when we consider Section 402(a) of the 1942 Revenue Act, by which Congress added Section 811(d)(5) to the Internal Revenue Code. By this amendment Congress expressly provided that transfers of community property in contemplation of death should be considered to have been made by the decedent, with the same exceptions as are provided in Section 811(e)(2). In other words, Congress expressly dealt with the problem of tax avoidance through conversions of community property into other forms of co-ownership, but limited the correc-

tive provision to cases in which the conversions were made in contemplation of death. Even if we should concede, which we do not, that the Commissioner may legislate to prevent tax avoidance where Congress fails to do so, there is no legislative vacuum to fill in the instant case. Indeed, the regulation under discussion violates the apparent Congressional intent to recognize, for estate tax purposes, property rights acquired by conversions of community property where the transfers are *not* in contemplation of death or otherwise within the proscriptions of subsections (c) and (d) of Section 811.

In the present case there is no contention that the joint tenancy property was acquired through conversions of community property in contemplation of death. Indeed, the joint tenancy property was acquired at a time when community property was subject to no heavier death taxes than other forms of cotenancy. The Commissioner, however, under the authority of his own regulation, asserts in effect that the joint tenancy property must be taxed as if it were community property *simply because it is derived from community property*. This reasoning has heretofore been rejected by the Tax Court. Thus, property held by husband and wife as tenants in common has been held taxable only to the extent of the decedent's one-half interest therein, notwithstanding the fact that it was derived from joint tenancy property which would have been fully taxable if held as such until death.

Merry M. Dennis, Executrix, 26 B. T. A. 1120;
Estate of Irwin A. Smith, 45 B. T. A. 59.

The opinion of the Tax Court in this case attempts to sustain the regulation under discussion on quite a different

theory than that presented in the respondent's brief, but one which is equally untenable. The Tax Court says, in effect, that the wife's interest in community property is derived from the husband, that the question is whether she received her interest in the joint tenancy property "for less than an adequate and full consideration in money or money's worth," and that under Section 811(e) only that part of community funds derived from personal services or separate property of the wife is to be considered as constituting "money or money's worth" within the meaning of Section 811(e)(1). The underlying premise, as stated in the opinion, is that "the wife's former interest in the community property is not regarded as property originally belonging to her." This premise is clearly erroneous. The California courts have consistently held that the wife's interest under Section 161a of the Civil Code comes into existence at the same time as the husband's and is in no sense derived by her from him. (*Cooke v. Cooke*, 65 Cal. App. (2d) 260, 150 P. (2d) 514, 516.) And that this is the rationale of such cases as *Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 239, was recently pointed out by the Supreme Court in *Commissioner v. Harmon*, 323 U. S. 44, 89 L. Ed. 60, when it said that the wife's interest "is an original and not a derivative vested property interest."

Respectfully submitted,

LEON B. BROWN,

JOHN W. ERVIN,

Amici Curiae.

No. 11759

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB - 4 1941

PAUL P. O'BRIEN, CLERK

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In the District Court of the United States in and for the
Southern District of California

Central Division

No. 6074-O'C

UNITED STATES OF AMERICA,

Plaintiff,

v.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Defendants.

COMPLAINT FOR DAMAGES

The United States of America, by James M. Carter, United States Attorney for the Southern District of California and Ronald Walker and Cameron L. Lillie, Assistant United States Attorneys for said district, alleges:

I.

That this action is brought in the above-entitled court pursuant to the provisions of Title 28, Section 41(1) U. S. C. A. by reason of the fact that the United States of America is named herein as plaintiff.

II.

That at all times herein mentioned the Los Angeles Municipal Airport was and now is located in the City of Inglewood, County of Los Angeles, State of California, within the Southern District of California, Central Division. [2]

III.

That at all times herein mentioned plaintiff was the owner of a certain P-51B airplane, Serial No. 43-12093; and that at all times herein mentioned said P-51B airplane was driven and operated by A. W. Pitcairn, and was engaged in official business of the United States of America.

IV.

That at all times herein mentioned defendant Douglas Aircraft Co., Inc., a California corporation, was the owner of a certain SBD-5 airplane, Serial No. 36528; said airplane was driven and operated by defendant Thomas W. Scott, with the consent and knowledge of defendant Douglas Aircraft Co. Inc., a California corporation.

V.

That on or about the 11th day of November, 1943, at the Los Angeles Municipal Airport in the City of Inglewood, County of Los Angeles, State of California, the defendant Thomas W. Scott did so carelessly, recklessly, negligently and in violation of law operate said SBD-5 airplane, Serial No. 36528, belonging to the defendant Douglas Aircraft Co. Inc., a California corporation, as to cause said airplane to collide with and damage the aforesaid P-51B airplane, Serial No. 43-12093, belonging to the plaintiff.

VI.

That by reason of said collision and as the result of carelessness; recklessness, negligence and violation of law by defendant Thomas W. Scott in operating said airplane belonging to defendant Douglas Aircraft Co. Inc., a California corporation, plaintiff was damaged in the sum of

Ten Thousand Five Hundred Ninety and 55/100 Dollars (\$10,590.55), which said sum was the reasonable cost of necessary repairs to said P-51B airplane.

Wherefore, plaintiff prays judgment against the defendants in the sum of Ten Thousand Five Hundred Ninety and 55/100 Dollars [3] (\$10,590.55), and for the costs herein.

JAMES M. CARTER
United States Attorney
RONALD WALKER
Assistant U. S. Attorney
CAMERON L. LILLIE
Assistant U. S. Attorney
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 11, 1946. Edmund L. Smith,
Clerk. [4]

[Title of District Court and Cause]

ANSWER OF DOUGLAS AIRCRAFT CO., INC.,
A CORPORATION

Comes now the Douglas Aircraft Co., Inc., a corporation, and answering the complaint of the plaintiff on file herein denies and alleges as follows:

FIRST DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The plaintiff's complaint fails to state a claim against defendant upon which relief may be granted for the rea-

son that the action is one for the recovery of damages to property, and under the law of California, where the said action is commenced and where the said accident to the property occurred, the right to bring an action is barred after the lapse of three years' time from the time of the accident, and the said action is particularly barred by the provisions [5] of Section 338, subdivision 3, of the Code of Civil Procedure of the State of California.

THIRD DEFENSE

Defendant admits the allegations contained in paragraphs I, II and IV, and admits that there was a collision between the airplane belonging to the defendant and the airplane alleged and described as plaintiff's, on the 11th day of November, 1943, at the Los Angeles Municipal Airport. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the complaint, and on that ground denies said allegations, and denies each and every other allegation in the complaint.

FOURTH DEFENSE

That the accident and any damages plaintiff may have sustained, if any, were due directly and proximately to an unavoidable and inevitable accident so far as this answering defendant, its agents, servants or employees, are concerned.

FIFTH DEFENSE

I.

That the defendant is informed and believes and upon that ground alleges that the plaintiff, under appropriate statutes, had seized control of the Los Angeles Municipal Airport prior to the 11th day of November, 1943, and was operating and controlling all operations in the area

of the said airport and at the said airport, and all other operations of all airplanes elsewhere in the continental United States, by virtue of the fact that the United States was at war, and by virtue of the foregoing said plaintiff was in charge of the tower at the place where the said accident occurred, to-wit: the Los Angeles Municipal Airport, and in charge of all the area contained within the said airport.

II.

That at all times herein mentioned and prior to the accident [6] in question, the said A. W. Pitcairn was an agent of the plaintiff and as such agent was operating the said P-51B airplane described in paragraph III of the complaint, and that at all times herein mentioned the control tower and its employees, particularly on the date and at the time of the accident, were agents, servants and employees of the United States and operating under the direction and control of the United States.

III.

That under and by virtue of the rules and customs of the airport and of the Civil Aeronautics Authority in charge of the flight of airplanes in and around airports and in the air throughout the United States and the operation of airplanes in general, the parking of an airplane upon or near the runway of an airport without immediately moving the same out of said runway and into a proper place for storage, was forbidden. That contrary to the said rules and regulations, the said agent of the plaintiff, A. W. Pitcairn, did knowingly violate the said rule and did park the said P-51B airplane on or near the said runway of the Los Angeles Municipal Airport just prior to the accident sued upon by the plaintiff in plaintiff's complaint, and continued to park the airplane there for some

time thereafter and until the time of the accident, contrary to the said rules.

IV.

That the said tower which was controlled by the agents, servants and employees of the plaintiff also controlled the traffic incoming and outgoing at the airport and the actions of the owners and pilots of airplanes at the said airport, and the said agents, servants and employees of the plaintiff in the said tower did know that the said A. W. Pitcairn had improperly parked and kept his P-51B airplane on the runway at the said airport and did continue to permit him to so park said airplane, and despite said knowledge did order the defendant's employee, Thomas W. Scott, who was piloting the SBD-5 [7] airplane belonging to the defendant Douglas Aircraft Co., Inc., a corporation, to land on the said runway where the airplane of the plaintiff was parked, and to proceed up the runway to the proper place to store and park said SBD-5 airplane, well knowing that the said airplane piloted by the said Thomas W. Scott was one which prevented the pilot from looking directly forward on the runway on which he was proceeding or on any runway on the ground because of the nature of the construction of said airplane with its nose up in the air hiding from view the ground directly ahead of the airplane as it proceeded, and negligently failed to warn said Thomas W. Scott of the parking of the P-51B thereon, and despite said knowledge the said tower at said field operated by the agents, servants and employees of the plaintiff or under their direction and control, did negligently order the said Thomas W. Scott to proceed upon the said runway, and said A. W. Pitcairn did negligently continue to park his said airplane upon the said runway, and such negligence on the

part of said plaintiff, its agents, servants and employees, did proximately cause and contribute to the accident and damages to the plaintiff's property.

Wherefore, defendant demands judgment that the plaintiff take nothing by its complaint, and for defendant's costs sustained herein.

JAMES V. BREWER

Attorney for Defendant Douglas Aircraft Co.,
Inc., a corporation. [8]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 7, 1947. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

ANSWER OF DEFENDANT THOMAS W. SCOTT

Comes now the defendant Thomas W. Scott, and answering the complaint of the plaintiff on file herein denies and alleges as follows:

FIRST DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief may be granted for the reason that the action is one for the recovery of damages to property, and under the law of California, where the said action is commenced and where the said accident to the property occurred, the right to bring an action is

barred after the lapse of three years' time from the time of the accident, and the said action is particularly barred by the provisions [10] of Section 338, subdivision 3, of the Code of Civil Procedure of the State of California.

THIRD DEFENSE

Defendant admits the allegations contained in paragraphs I, II and IV, and admits that there was a collision between the airplane operated by this defendant and the airplane alleged and described as plaintiff's, on the 11th day of November, 1943, at the Los Angeles Municipal Airport. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the complaint, and on that ground denies said allegations, and denies each and every other allegation in the complaint.

FOURTH DEFENSE

That the accident and any damages plaintiff may have sustained, if any, were due directly and proximately to an unavoidable and inevitable accident so far as this answering defendant is concerned.

FIFTH DEFENSE

I.

That the defendant is informed and believes and upon that ground alleges that the plaintiff, under appropriate statutes, had seized control of the Los Angeles Municipal Airport prior to the 11th day of November, 1943, and was operating and controlling all operations in the area of the said airport and at the said airport, and all other operations of all airplanes elsewhere in the continental United States, by virtue of the fact that the United States was at war, and by virtue of the foregoing said plaintiff was in charge of the tower at the place where the said

accident occurred, to-wit: the Los Angeles Municipal Airport, and in charge of all the area contained within the said airport.

II.

That at all times herein mentioned and prior to the accident in question, the said A. W. Pitcairn was an agent of the plaintiff, and as such agent was operating the said P-51B airplane described in [11] paragraph III of the complaint, and that at all times herein mentioned the control tower and its employees, particularly on the date and at the time of the accident, were agents, servants and employees of the United States and operating under the direction and control of the United States.

III.

That under and by virtue of the rules and customs of the airport and of the Civil Aeronautics Authority in charge of the flight of airplanes in and around airports and in the air throughout the United States and the operation of airplanes in general, the parking of an airplane upon or near the runway of an airport without immediately moving the same out of said runway and into a proper place for storage, was forbidden. That contrary to the said rules and regulations, the said agent of the plaintiff, A. W. Pitcairn, did knowingly violate the said rule and did park the said P-51B airplane on or near the said runway of the Los Angeles Municipal Airport just prior to the accident sued upon by the plaintiff in plaintiff's complaint, and continued to park the airplane there for some time thereafter and until the time of the accident, contrary to the said rules.

IV.

That the said tower which was controlled by the agents, servants and employees of the plaintiff also controlled the traffic incoming and outgoing at the airport and the actions of the owners and pilots of airplanes at the said airport, and the said agents, servants and employees of the plaintiff in the said tower did know that the said A. W. Pitcairn had improperly parked and kept his P-51B airplane on the runway at the said airport and did continue to permit him to so park said airplane, and despite said knowledge did order the defendant, Thomas W. Scott, who was piloting the SBD-5 airplane belonging to the defendant Douglas Aircraft Co., Inc., a corporation, to land on the said runway where the airplane of the plaintiff was [12] parked, and to proceed up the runway to the proper place to store and park said SBD-5 airplane, well knowing that the said airplane piloted by the said Thomas W. Scott was one which prevented the pilot from looking directly forward on the runway on which he was proceeding or on any runway on the ground because of the nature of the construction of said airplane with its nose up in the air hiding from view the ground directly ahead of the airplane as it proceeded, and negligently failed to warn said Thomas W. Scott of the parking of the P-51B thereon, and despite said knowledge the said tower at said field operated by the agents, servants and employees of the plaintiff or under their direction and control, did negligently order the said Thomas W. Scott to proceed upon the said runway, and said A. W. Pit-

cairn did negligently continue to park his said airplane upon the said runway, and such negligence on the part of said plaintiff, its agents, servants and employees, did proximately cause and contribute to the accident and damages to the plaintiff's property.

Wherefore, defendant demands judgment that the plaintiff take nothing by its complaint, and for defendant's costs sustained herein.

JAMES V. BREWER

Attorney for Defendant Thomas W. Scott. [13]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 2, 1947. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

VERDICT OF THE JURY

* * * * *

We, the jury in the above entitled cause, find the issues in favor of the defendants.

Dated: Los Angeles, California, May 14th, 1947.

CHAS. T. PIKE

Foreman of the Jury

[Endorsed]: Filed May 14, 1947. Edmund L. Smith, Clerk. [15]

[Title of District Court and Cause]

NOTICE OF MOTION FOR JUDGMENT OR
NEW TRIAL

To James V. Brewer, Attorney for Defendants, and
Douglas Aircraft Co. Inc., a corporation, and
Thomas W. Scott, Defendants.

Please Take Notice that the undersigned will bring the
above motion on for a hearing before this Court in Court-
room 7 of the above-entitled Court, at the Post Office and
Courthouse Building in the City of Los Angeles, at 10
o'clock A. M. on June 2, 1947, or as soon thereafter as
counsel can be heard.

Dated: May 22, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney
Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

By Cameron L. Lillie

Attorneys for Plaintiff

[Endorsed]: Filed May 22, 1947. Edmund L. Smith,
Clerk. [16]

[Title of District Court and Cause]

ALTERNATIVE MOTION FOR JUDGMENT OR
NEW TRIAL

Plaintiff moves the Court to set aside the verdict entered in the above-entitled cause on May 14, 1947, and to enter judgment in accordance with its motion for directed verdict on the ground that the motion for directed verdict should have been granted because:

A. There was no dispute in the facts introduced into evidence and therefore the question is one of law.

B. There was no evidence of contributory negligence on the part of the plaintiff, its agents, servants, or employees, or on the part of A. W. Pitcairn, the pilot of the plaintiff's airplane;

C. The evidence in the cause showed conclusively that the damages sustained by the plaintiff were the proximate result of the defendant's negligence.

In the alternative, plaintiff moves the Court to set aside the verdict and grant defendant a new trial on the following grounds:

A. There was insufficient evidence to justify the verdict; [17]

B. There was no evidence of contributory negligence on the part of the plaintiff, its agents, servants, or employees, or on the part of A. W. Pitcairn, the pilot of the plaintiff's airplane;

C. The evidence in the cause showed conclusively that the damages sustained by the plaintiff were the proximate result of the defendant's negligence.

Respectfully submitted,

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

By Cameron L. Lillie

Attorneys for Plaintiff

[Endorsed]: Filed May 22, 1947. Edmund L. Smith,
Clerk. [18]

In the District Court of the United States in and for the
Southern District of California
Central Division
No. 6074 O'C

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Defendants.

JUDGMENT ON VERDICT FOR DEFENDANTS

Be It Remembered, that the above entitled case was set for trial on May 6, 1947, at 10 o'clock A. M. in Room 7 of the Federal Building, Los Angeles, California, before

the Honorable J. F. T. O'Connor, District Judge Presiding, and the same trailed from this day until May 12, 1947, when the trial was commenced and the plaintiff being represented by James M. Carter, United States Attorney, and Cameron L. Lillie, Assistant United States Attorney, and the defendants Douglas Aircraft Co., Inc., a corporation, and Thomas W. Scott being represented by James V. Brewer, and both parties having announced they were ready a jury was duly impaneled and questioned by the Court on voir dire, and after peremptory challenges and both sides having announced that they were satisfied with the jury, the same was sworn to try the case and thereafter evidence having been presented by plaintiff and by the defendants, and the Court having duly instructed the jury as to the law and the jury did then, on the [19] 14th day of May, 1947, render its verdict with title of the Court and cause as above stated, said verdict was as follows:

“VERDICT OF THE JURY

We, the jury in the above entitled case, find the issues in favor of the defendants.

Dated: Los Angeles, California, May 14, 1947

(Signed) Charles T. Pike

Foreman of the Jury”

and the said verdict of the jury having been duly filed on May 14, 1947, it appearing to the Court to be proper in the premises, it is hereby

Ordered, Adjudged and Decreed, pursuant to said verdict, that the United States of America, plaintiff, take nothing by their action herein.

Dated: Los Angeles, California, May 26, 1947.

J. F. T. O'CONNOR

District Judge

Approved as to form.

Dated: May 26, 1947.

JAMES M. CARTER, United States Attorney,
RONALD WALKER, Assistant U. S. Attorney,
CAMERON L. LILLIE, Assistant U. S. Attorney,

By Cameron L. Lillie

Attorneys for Plaintiff

Judgment entered May 26, 1947. Docketed May 26, 1947. Book C. O. B. 43, page 317. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed May 26, 1947. Edmund L. Smith, Clerk. [20]

[Minutes: Monday, June 2, 1947]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for hearing of motion of plaintiff for a new trial, pursuant to notice filed May 22, 1947; also, to set aside judgment and enter judgment for the plaintiff; Cameron Lillie, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; James V. Brewer, Esq., appearing as counsel for the defendant; Attorney Lillie argues. The Court makes a statement and it is ordered that the said motion of the plaintiff for a new trial is denied and exception allowed. [21]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Defendants, Douglas Aircraft Co., Inc., a corporation, and Thomas W. Scott, and to Their Attorney, James V. Brewer:

Notice Is Hereby Given that the United States of America does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on or about the 26th day of May, 1947, and from the whole thereof.

Dated this 8th day of August, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Plaintiff [22]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 8, 1947. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH *DISTRICT*

It appearing that the Exhibits heretofore used at the trial of this action should be sent to the United States Circuit Court of Appeals for the Ninth *District* in lieu of copies thereof;

It Is Hereby Ordered that the Clerk of the Court for this District transport said original Exhibits to the United

States Circuit Court of Appeals for the Ninth *District* and that upon the termination of said appeal the said original Exhibits shall be returned to the Clerk of this District.

Dated this 6th day of August, 1947.

JACOB WEINBERGER

Judge of United States District Court

[Endorsed]: Filed Aug. 6, 1947. Edmund L. Smith,
Clerk. [24]

[Title of District Court and Cause]

ORDER FOR EXTENSIONS OF TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE ACTION

Notice of Appeal having been filed on the eighth day of August, 1947, and it appearing to the Court that a certified copy of the transcript of record of said cause cannot be prepared prior to October 20, 1947, and upon motion of the appellant in the above-entitled action that the time within which appellants may file the record on appeal and docket the action with the Circuit Court of Appeals may be extended in accordance with Rule 73(g), Rules of Civil Procedure for the District Courts of the United States:

It Is Hereby Ordered that time within which appellants may file the record on appeal and docket the action with the Circuit Court of Appeals be, and is hereby extended to and including October 20, 1947.

Dated this 3d day of September, 1947.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Sep. 4, 1947. Edmund L. Smith,
Clerk. [27]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain full, true and correct copies of Complaint for Damages; Answer of Douglas Aircraft Co., Inc.; Answer of Defendant Thomas W. Scott; Verdict of the Jury; Notice of Motion for Judgment or New Trial; Alternative Motion for Judgment or New Trial; Judgment on Verdict for Defendants; Minute Order Entered June 2, 1947; Notice of Appeal; Order of Transmission of Original Exhibits; Designation of Record on Appeal and Order for Extension of Time for Filing Record and Docketing Appeal which, together with copy of reporter's transcript of proceedings on May 13 and 14, 1947 and original Plaintiff's Exhibits 1, 2, and 3-A to 3-X, inclusive and original Defendants' Exhibits A-1 to A-19, B-1, B-2 and C, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 15th day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH, Clerk

By Theodore Hocke

Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, May 13, 1947

Appearances:

For the Plaintiff: James M. Carter, United States Attorney; by Cameron L. Lillie, Assistant United States Attorney.

For the Defendant: James V. Brewer, Esq., 1125 Fidelity Building, Los Angeles, California.

Los Angeles, California, May 13, 1947,

10:00 O'Clock A. M.

(A jury was duly impaneled and sworn.)

The Clerk: No. 6074 Civil, United States vs. Douglas Aircraft Co., for further jury trial.

Mr. Lillie: Ready for the government.

Mr. Bremer: Ready.

The Court: Let the record show the jury are present and counsel in court.

Do you care to make an opening statement, government?

Mr. Lillie: Yes, your Honor.

The Court: All right, proceed.

(Opening Statements)

(On behalf of Plaintiff and Defendant)

The Court: Call your first witness.

Mr. Lillie: Mr. Baker.

JOHN R. BAKER

called as a witness by and in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John R. Baker.

The Clerk: B-a-k-e-r?

The Witness: That's right.

Direct Examination.

Q. By Mr. Lillie: Mr. Baker, where do you reside? [2*]

A. Altadena.

Q. And what is the address?

A. 172 West Figueroa Drive, Altadena, California.

Q. By whom are you employed?

A. North American Aviation, Inc.

Q. How long have you been employed by North American?

A. Nine years and nine months.

Q. At the time of the accident in question what was your occupation?

A. Assistant contract administrator.

Q. And as an assistant contract administrator were certain records and files kept under your supervision?

A. Yes, sir.

Q. In the course of business? A. Yes, sir.

Q. I will show you a file and ask you if you recognize it. A. I do.

Q. Is that file kept in the ordinary course of business under your supervision? A. Yes, sir.

(Testimony of John R. Baker)

Q. Does it relate to the airplane which was damaged in the action which is under litigation now?

A. It does.

Mr. Lillie: I will offer it in evidence, your Honor. [3]

The Court: Has the defendant seen the file?

Mr. Lillie: Yes.

The Court: In evidence.

The Clerk: Government's Exhibit No. 2.

(The document referred to was received in evidence and marked as Government's Exhibit No. 2.)

Q. By Mr. Lillie: Do you recall what the number of the airplane that was damaged was that was assigned by the Army, Mr. Baker?

A. By memory, are you asking?

Q. Yes. Well, can you refer to it in the file?

A. Yes, sir. 43-12093.

Mr. Brewer: What was that again, Mr. Baker?

The Witness: 43-12093.

Q. By Mr. Lillie: In that file was there a contract entered into by North America Aviation and the government for the purchase of a stated number of airplanes?

A. Yes, sir.

Q. How many were there? A. 400.

Q. When was that contract entered into?

A. December 15, 1942.

Q. Thereafter was the plane in question delivered pursuant to that contract?

A. Yes, sir. [4]

Q. When was it delivered and accepted by the Army? Do your records indicate that?

A. The contract does not indicate that, but the receiving report indicates that it was delivered to the Army April 29, 1943.

(Testimony of John R. Baker)

Q. April 29, 1943. Do your records indicate that it was accepted also as of that date? A. Yes, sir.

Q. Did the Army take control and possession of it, do you know? Do your records indicate?

A. The records indicate such, yes.

Q. Do your records indicate whether or not it was turned back to North American? A. Yes.

Q. On what day? A. May 4, 1943.

Q. Do your records indicate the purpose?

A. For flight tests.

Q. Do the records in that file indicate how long you held it before it was again turned back to the Army?

A. I don't know how to answer your question on that, sir, because the airplane was in our possession at the time the accident occurred; and we retained it until after we repaired it.

Q. Then after you returned it, did you— [5]

The Court (Interposing): He did not say, "returned."

Q. By Mr. Lillie: After you repaired it, did you return it to the War Department, the Army?

A. After it was repaired, we returned it to the War Department.

Q. Do your records indicate that?

A. Not these here, no.

Q. Do you know of your own knowledge?

A. Yes.

Q. Do your records in that file indicate whether a survey was made on the plane after it was damaged?

A. Yes.

Q. Do they indicate who made the survey?

A. Yes, sir.

Q. Who made the survey?

A. Plant Protection.

(Testimony of John R. Baker)

Q. Do your records indicate a survey as to the repair of the plane? By that I mean do your records indicate whether or not anyone estimated what the repair would be? A. Yes.

Q. Do your records indicate that?

A. Yes, sir, they do.

Q. Do they indicate who made the survey?

A. No, they don't show that.

Q. Does one of your records in that file indicate [6] whether or not the repairs were made?

A. Yes, sir.

Q. Is this the paper (indicating)?

A. That is the paper. That shows our estimate as to what it would take to repair the airplane.

Q. Is that just for materials or materials and labor?

A. Materials and labor.

Q. And the amount of that is how much?

A. \$5,139.78.

Q. \$5,139.78. Well, now, was all the material supplied by North American? A. No, sir.

Q. What does this "Wing Panel Replacement Assembly 1GFE" stand for?

A. That stands for government-furnished equipment as furnished to North American by the government.

Q. Was that by reason of the fact you didn't have that merchandise in stock?

A. That's right.

Q. And the government did have it in stock?

A. Correct.

Q. Do you know what the valuation of a wing panel replacement assembly was at that time? A. I do.

Q. Also as to an elevator assembly, covered? [7]

A. Yes, sir.

(Testimony of John R. Baker)

Q. Stabilizer assembly, vertical? A. Yes.

Q. And a rudder assembly, covered? A. Yes.

Q. And those are the only government-issued equipment? A. That's right.

Q. Can you tell me what those amounts are, off-hand?

A. I couldn't, without referring to our files on that.

Q. Well, you prepared a memorandum for me, and I will show it to you so that your recollection may be refreshed and see if you can then determine what the amounts were. A. Yes.

Q. How much was the wing panel replacement assembly? A. \$4,640.33.

Q. And the aileron assembly? No, it is an elevator.

A. Elevator, \$262.04.

Q. Stabilizer assembly, vertical? A. \$284.58.

Q. And the rudder? A. \$262.88.

Q. So that the amount that would have been charged the Army, had they not had the parts to supply you, would have been the total of the two amounts: \$5,449.83.

A. Correct. [8]

Q. And the \$5,139.78?

A. That's right.

Q. Is that correct? Thereafter was the Army billed, Mr. Baker? Do your records indicate that the Army was billed, the government, the amount in question?

A. The Army was billed by North American by the amount in this quotation, that is correct.

Q. Do you know whether or not it was paid?

A. Yes, sir, it was.

Mr. Lillie: Cross examine.

(Testimony of John R. Baker)

Cross Examination.

By Mr. Brewer:

Q. Mr. Baker, this memo of May 1, 1947, relating to these prices of parts: are those the prices charged at that time? A. That's right.

Q. When you gave the number of this plane, this "43," does that mean that in '43 it was built?

A. No, sir. That is the designation of the Army Air Forces, the serial numbers the Army Air Forces placed on the airplane. The "43" represented the year that it was built.

Q. How many planes of this kind had been built?

A. At the time?

Q. Yes.

A. That this accident had occurred? This was the [9] first airplane on that contract.

Mr. Brewer: All right, I think that is all.

Mr. Lillie: That is all, Mr. Baker.

(Witness excused.)

Mr. Lillie: Call Mr. Armitage.

ROMMEL JOSEPH ARMITAGE, JR.

called as a witness by and in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Rommel Joseph Armitage.

The Clerk: R-o-m-m-e-l Joseph?

The Witness: Yes.

The Clerk: Your last name?

The Witness: A-r-m-i-t-a-g-e.

(Testimony of Rommel Joseph Armitage, Jr.)

The Clerk: Junior?

The Witness: Yes.

The Clerk: Rommel Joseph Armitage, Jr.?

The Witness: Yes.

The Clerk: Thank you.

Direct Examination.

By Mr. Lillie:

Q. Where do you reside, Mr. Armitage?

A. 825 West 161st, Gardena.

Q. Where are you employed now?

A. North American Aviation. [10]

Q. Were you so employed on November 11, 1943?

A. I was.

Q. What was your position at that time, Mr. Armitage?

A. General foreman of the Flight Test Hangar, in charge of maintenance.

Mr. Lillie: I don't hear you.

Mr. Brewer: Keep your voice up.

The Witness: General foreman of the Flight Test Hangar, in charge of maintenance.

Q. By Mr. Lillie: Do you recall the accident in which this plane was damaged? A. I do.

Q. Did you see the plane after the accident?

A. I did.

Q. Did you make a survey on the plane for the repair of it? A. Parts required, yes.

Q. I will show you a quotation which is contained in Government's Exhibit 2. I will ask you to look at that.

A. (Examining document)

Q. And tell the jury whether or not those parts were actually placed upon that plane.

(Testimony of Rommel Joseph Armitage, Jr.)

A. Those parts were placed on that airplane.

Q. Under your supervision?

A. Under my supervision, yes. [11]

Q. Were they the necessary parts required to repair that plane?

A. Yes.

Mr. Lillie: That is all.

Mr. Brewer: No questions.

Mr. Lillie: Step down.

The Court: That is all, thank you.

(Witness excused.)

Mr. Lillie: Mr. Virgin.

EDWARD WARREN VIRGIN,

called as a witness by and in behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Edward Warren Virgin.

The Clerk: How do you spell your name?

The Witness: Virgin, V-i-r-g-i-n.

The Clerk: Will you take the stand, please?

Direct Examination.

By Mr. Lillie:

Q. Where do you reside, Mr. Virgin?

A. 2932 Wicklow Road, Los Angeles, California.

Q. What is your occupation, sir?

A. I am the chief test pilot, North American Aviation.

Q. How long have you been employed in that capacity?

A. I have been employed with North American six years [12] and three months. I don't recall the exact date of my being made chief test pilot.

(Testimony of Edward Warren Virgin)

Q. Do you recall whether or not it was prior to November 11, 1943, when this accident occurred?

A. Yes.

Q. It was prior to that? A. Yes.

Q. What are your duties as chief test pilot and what were your duties at that time on November 11, 1943?

A. To make flights on experimental aircraft, flight tests on experimental aircraft, and also direct in the planning and conduction of other tests by the remainder of the flight test section.

Q. How many pilots did you have working under you at that time, Mr. Virgin? A. Four.

Q. What were their duties?

A. To conduct authorized tests on experimental aircraft.

Q. Now, when you say "authorized tests" what do you mean by "authorized tests"?

A. Well, the Army loaned to North American on contract certain experimental aircraft for the express purpose to conduct tests on those aircraft pertaining to the development, proving and the establishment of the particular characteristics [13] of that airplane.

Q. Well, did the Army, under its authorization, designate what the tests were to be?

A. We requested of the Army the airplanes for specific test purposes.

Q. Could any pilot fly those planes?

A. Only the authorized pilots we had on our staff at the time.

Q. Were they authorized by or certified by the Army?

A. They were.

Q. For that particular purpose? A. Yes.

(Testimony of Edward Warren Virgin)

Q. Did you have in your employ at that time A. W. Pitcairn? A. Yes.

Q. How long had he been working for North American, do you know? A. I don't recall.

Q. Was he an experienced pilot, do you know?

A. Yes.

Q. Was he authorized to make the flight tests?

A. He was.

Q. On the day in question, on November 11, 1943?

A. He was.

Q. Who gave him that authorization? [14]

A. I assigned Pitcairn to the flight, and I was exercising a prerogative which the Army bestowed upon me.

Q. What was the purpose of the test, Mr. Virgin?

A. The purpose of the test was to determine the air-flow characteristics of the coolant scoop of the P-51 aircraft.

Q. Did you use any instruments to determine that?

A. Yes.

Q. What kind of instruments did you use?

A. We used in the scoop in question a series of rakes which, in turn, are evenly spaced throughout the scoop. These rakes are connected to monometers or airspeed indicators in order to read the total pressure and the static pressure in this scoop in order to determine the flow characteristics, the airflow characteristics.

Q. Now, how was the plane taken onto the landing strip?

A. It was towed out by a tractor.

Q. And was there a particular purpose?

A. The reason that we did that is because the rakes, which I have mentioned, have very small pressure and

(Testimony of Edward Warren Virgin)

static holes in them; and if you start the propeller, the scoop being right behind the propeller, dirt and dust are picked up off the runway, thrown into the scoop, which in turn is very likely to clog up the rake openings, hence nullifying the test. [15]

Q. Was this the first test of this type of equipment that had been made by North American? A. No.

Q. Was that custom in usage on that field to proceed on that basis of towing a plane out?

Mr. Brewer: Just a moment. We object to that on the ground that the witness is not shown to be qualified. There is no proper foundation laid as to usage on that field.

The Court: Well, you can develop that.

Q. By Mr. Lillie: How long did you work out at that field, Mr. Virgin?

A. Since February 1, 1941.

Q. In that connection had you flown different types of planes from that field and into it? A. Yes.

Q. How often?

A. Oh, in the early stages of the war, along about 1941, I would fly on the average of 30 hours a month, 30 or 40 hours a month.

Q. How many hours of flight have you had?

A. 3,000.

Q. On what kind of ships?

A. Mostly all military types.

Q. Single and multiple-motor?

A. Single and multi-engine. [16]

Q. Are you still flying out at that field?

A. Yes.

Mr. Lillie: Is he sufficiently qualified, your Honor?

(Testimony of Edward Warren Virgin)

The Court: Yes, proceed.

Q. By Mr. Lillie: I will ask you if, in respect to this test that Pitcairn had been authorized to conduct that morning, it was the practice and custom and usage at the field to tow that plane out to the air strip which he was going to take off?

A. In a test of that type we generally contact the control tower and tell them exactly what we are going to do, and they grant any reasonable request, which I consider this to be.

Q. Do you know whether they were contacted that day? Did you contact them?

Q. I am not sure, but I can reasonably be assured that it was done.

Q. What occurred when a plane landed? Did you send a tractor out after it then?

A. It was just customary at the time to not have men standing by awaiting for the termination of such a flight but to have the pilot notify us through the control tower when he was about to land, and we would dispatch a tractor to pick him up and take him into the hangar.

Q. Do you know what the size of the wingspan of a P-51 [17] happens to be?

A. Approximately 37 feet.

Q. If a plane, a P-51, were parked on the edge of a runway with its right wheel as close to the edge as it could possibly be, approximately how much would be extending into the runway?

A. Not over 25 feet.

Q. On those P-51s, what type of a seat do they have?

A. Well, it is a bucket seat designed to hold a seat-type parachute which is adjustable.

(Testimony of Edward Warren Virgin)

Q. Do they have any way of raising or lowering the seat in taxiing? A. Yes.

Q. Are you at all familiar with the Douglas SBD, such as the type that was flown by Mr. Scott?

A. Only just a knowledge that would come with my profession, being familiar with most all aircraft in a vague way.

Q. Well, do you know whether it has a process whereby the seat can be raised and lowered before taxiing?

A. I have never seen it but I am sure it does.

Mr. Lillie: That is all.

The Court: Ladies and gentlemen of the jury, you will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. Do not form or express any [18] opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take our morning recess.

(Recess.)

The Court: Proceed. Let the record show the jury are present.

Mr. Lillie: Your Honor, I should like to ask a few more questions of this witness.

The Court: All right.

Mr. Lillie: We have another witness due at 2:00 o'clock, but we don't know whether he will be able to get in. This man may be able to clear it up so we can dispense with the other witness.

The Court: Well, see how far we can get.

Q. By Mr. Lillie: Mr. Virgin, since 1941 to this date you have worked out at the Municipal Airport, is that correct? A. Yes.

(Testimony of Edward Warren Virgin)

Q. Did you daily come in contact with the management of the airport?

A. Yes, I did, along about that particular time because our offices were right under the offices of the city officials.

Q. Do you know to your own knowledge who managed, controlled and maintained the airport?

A. Mr. Woody DeSilva was the manager, and Mr. Tucker—I don't know his capacity—but he seemed to be the righthand man.

Q. Do you know by whom they were employed?

A. The City of Los Angeles.

Q. Do you know whether or not at any time during the war period the government took over control of the airport? By that I mean the War Department?

A. I don't think they ever did for management.

Q. Well, do you know as to who controlled it?

A. No, they didn't for control. They only laid down, you might say, rules under which we operated. I can elaborate on that a little.

At the beginning of the war—well, let's put it this way—before the war we were given a free hand to clear with the control tower and go and conduct a test in any place that we so desired. After the war started the Army set up control zones or, we will say, flight test areas; and we would clear in the normal manner through the CAA control tower and tell them that we were conducting a test, for instance, in the south test area which was North American's area.

Q. Well, by "south test area" do you mean ground or air space?

A. It is air space above certain ground markings.

(Testimony of Edward Warren Virgin)

Q. I see. Well, did you have other airplanes that you were trying out this cooling scoop on before this time?

A. No.

Q. Well, then, had you ever had occasion before this time to need a tow for an airplane? A. Yes.

Q. What was the reason for that service?

A. We have made previous boundary layer surveys over the wing on a P-51 aircraft which employs the same type of air pick-up. [23]

Q. What did you call them again?

A. A boundary layer survey.

Q. Boundary what? A. Layer, L-a-y-e-r.

Q. Boundry layer survey?

A. In other words, it is more or less to test the efficiency of a wing.

Q. Of the wing itself? A. Yes.

Q. I see. These rakes tested the air pressure that was exerted on the bottom of the wing, is that it?

A. On the top of the wing, yes.

Q. On the top of the wing. So that you wanted to keep the dust out of those holes in the rakes?

A. Yes, sir.

Q. And the runways were covered with dust; the field itself was covered with dust, wasn't it?

A. Any macadam surface has a sufficient amount of dust or dirt particles that could clog up those openings.

Q. About how many of these tests of this nature had been done before the accident on Armistice Day, 1943, with this Mustang, if you know?

A. One series of tests before this scoop test.

Q. On one plane or several? A. One plane. [24]

Q. And a series of tests: about how many flights would that be?

(Testimony of Edward Warren Virgin)

A. I would think that a test could be run in maybe 10 hours, 10 or 15 hours flying time.

Q. Well, how many flights, take-offs and landings?

A. Ten or 15.

Q. Fifteen?

A. Ten or 15 one-hour flights.

Q. Oh, I see. How much of a flight had that been this day? A. About an hour's flight.

Q. About an hour. And over what period of time had this been done, these tests?

A. I only recall the day of the accident was not the first flight on that particular test.

Q. And this particular test was being done for the United States Army, wasn't it? A. Yes.

Q. Had they furnished the equipment for the tests?

A. No, sir.

Q. The rakes and cooling scoop?

A. The cooling scoop is part of the airplane. The instrumentation was the property of North American.

Q. I see. At any rate, the Army knew about this test and had informed the CAA tower there at the field that you were [25] going to make those tests?

A. No, sir.

Q. Who informed them of that? A. We did.

Q. You did. And then they authorized you to make those flights tests from that field?

A. They gave us permission to.

Q. Then the tower knew of your desire to have these planes hauled in by tractors? A. Yes.

Q. That had been done on other occasions before this accident? A. Yes.

Q. Had you ever seen that done before? A. Yes.

(Testimony of Edward Warren Virgin)

Q. You say it was customary for the pilot to notify the control tower while he was in the air of his intention to approach and land and that he wanted the tractor tow?

A. Yes.

Q. Then the tower would notify you or your staff out there and you would send out a tractor to tow?

A. Yes.

Q. The tower would tell you where to go with the tractor, is that it? A. Yes, sir. [26]

Q. Where did you customarily go?

A. The customary spot for the airplane to taxi to after landing was the spot that Mr. Pitcairn stopped the airplane.

Q. Did you usually have the tractor out there for his landing when he got there? A. No.

Q. Where were the tractors kept?

A. Just under the control tower at the field, hardly a few minutes away from the location that the airplanes stopped.

Q. Do you understand this diagram here?

A. Yes.

Q. Would you step here and mark it where the tractors were kept?

The Court: Mr. Brewer, will you take a red pencil and mark it with a large "N," and "S," an "E," and "W" about four inches?

Mr. Brewer: Yes, your Honor. (Marking diagram)
Is that large enough?

The Court: Thank you. That will help the jury.

Q. By Mr. Brewer: Will you mark now with that red pencil, too, where these tractors were?

(Testimony of Edward Warren Virgin)

A. The tractors were at—during our operations here the tractors were apt to go anywhere out on this landing apron or anywhere out on Runway C which we were using as our run-up area. The spot, of course, that the airplanes stopped [27] was right here (indicating).

The Court: Put an "X" there and draw a line and put your initials.

The Witness: (Marking diagram) An "X," sir, where the airplanes stopped?

The Court: That is right.

The Witness: (Marking diagram)

Q. By Mr. Brewer: Now, will you draw another "X" at the place where the tractors were customarily kept. A. Yes. (Marking diagram)

Q. And, if you will, now, just draw two lines down toward the bottom of the map and put your initials in.

A. (Marking diagram)

Q. While you are still at the diagram I want to ask you what route these tractors followed in getting over to the airplane from there?

A. Generally we have a drainage ditch right down about the middle of this strip, and generally they would go across here over on the road, over to this drainage ditch and right out the drainage ditch.

Q. All right. You may resume the stand.

Had you on occasions prior to November 11, 1943, seen this plane and the other planes that you spoke about where you had those tests use the tractor? Have you seen those planes being landed and towed in? [28]

A. Yes.

(Testimony of Edward Warren Virgin)

Q. And in the ordinary course of doing those things was it necessary for the planes to stand out there quite a while before they got out to them?

A. It was not necessary but—

Q. Did it happen, I mean?

A. I don't consider five, 10 minutes any excessive length of time.

Q. Well, was that the length of time they usually stood out there?

A. I can't recall that. I can't recall whether it was or was not. But I wouldn't say that 10 minutes, five or 10 minutes was an excessive length of time.

Q. Well, isn't it customary on an airport as busy as this to move all airplanes from the runways immediately after their landings?

A. That is correct. That is the desirable thing to do. However, the airport was devoted more or less to the activities of North American and the Douglas Company in the conduct of flight tests.

Q. There were several hundred landings and take-offs during the course of one day, weren't there, at that field?

A. Quite a few.

Q. This P-51 was camouflaged with brown paint, was it not? [29]

A. Painted with brown paint, yes.

Q. That is what we call a "Mustang"? A. Yes.

Q. Was it a monoplane, low-wing? A. Yes.

Q. And a tricycle landing gear?

A. No, conventional landing gear.

Q. Well, describe that to the jury, will you, please?

A. An airplane with a conventional landing gear has the two main wheels in the wing and a tail wheel, where

(Testimony of Edward Warren Virgin)

as a tricycle landing gear as he asked about has the two main landing gears in the wing and a nose wheel. That is the difference.

Q. How is the tractor hooked to the plane in case of towing like that, Mr. Virgin?

A. They have a towbar which is more or less of a triangle. One part hooks to one gear, the other to the other gear; and at the apex of the triangle the tractor hooks on, and it is towed.

Q. Did you go out to this plane following the accident? Were you there at the field?

A. I did. I did.

Q. Did you see the accident? A. No.

Q. You went out to the plane following the accident? A. Yes.

Q. And there was to the right or northwest of the plane a lot of space there, wasn't there, in this triangular space indicated on the diagram?

A. Well, it is flat ground there with grass, yes.

Q. Yes, with grass on it, was it not? A. Yes.

Q. This was the fall time, the grass was brown, was it not, dried up brown?

A. Well, I don't recall. I presume it might have been.

Q. All right. Well, at any rate, there were no other planes in that space, that triangular space I have just indicated? A. No.

Q. And there was plenty of room. It was big enough in size for this plane to park out there, the Mustang?

A. Well, that would defeat the entire purpose of the whole test, to taxi out in the dirt and get these rakes all full of dust. It is impossible to do that.

(Testimony of Edward Warren Virgin)

Q. The plane had to pass along the runway for a long distance before it got to that point, didn't it?

A. Yes, sir.

Q. The runway was dusty, too, wasn't it?

A. That is correct.

Q. And in passing along the runway it had to pull it- [31] self along by the propeller, didn't it?

The Court: Mr. Brewer, make it clear. When you say "the point" indicate the direction.

Mr. Brewer: Yes.

Q. The landings of these planes were made on 25-R, were they not?

A. Our airplane landed on 25-L.

Q. 25-L? A. Yes.

Q. The main runway? A. Yes.

Q. Did they all do that, these experimental planes of yours? A. Not necessarily.

Q. You mean this particular day this one did?

A. It did that day, yes.

Q. I see. So it landed on 25-L, the main runway and the widest one, and went down that runway to—

The Court (Interposing): West.

Q. By Mr. Brewer:—west to the diagonal runway 22?

A. That is correct.

Q. And then turned down the diagonal runway to the southwest and pulled over to the edge of the runway?

A. That is correct.

Q. About how far was it from the edge, the most south- [32] erly edge of the main runway?

A. A hundred feet plus.

Q. A little over a hundred feet? A. Yes.

(Testimony of Edward Warren Virgin)

Q. Well, the field with the grass in it was no more dusty than the runway, was it, sir?

Mr. Lillie: I object to that as argumentative.

The Court: Oh, no, I think that is proper to get all the conditions in there, counsel.

The Witness: Well, I will enlighten you a little bit on one point that has not been brought out. When the pilot just gets the airplane on the ground from a test like this he cuts the engine off. Now, he coasted all the way down to the spot that he stopped in order just to keep the propeller from kicking up dirt and throwing it into the scoop.

Now, it is impossible in the conduction of such a test to take an airplane right straight up or bring it right down. So the only thing we can do is take every precaution we can to cut out as many propeller revolutions as we possibly can in the conduct of that test. Hence, it is necessary to tow it out to the point of take-off. Of course, it is under power at that time and there is a possibility of dirt blowing into the scoop, and the same on landing, until such point as he cuts the engine off. Hence, that is the best we can do.

We have taken all precaution against keeping that pro- [33] peller on, the engine running, as much as we can.

Q. By Mr. Brewer: By question was, The grassy land in between these runways was no more dusty than the runways, was it? A. Oh, yes.

Q. About where would that plane land on this main runway in the ordinary course of flight where they intended to cut off the motor and turn up diagonally on 22?

A. He would land between the diagonal and the end of the field.

(Testimony of Edward Warren Virgin)

Q. How far out there, how many hundred feet?

A. A few hundred feet.

Q. About five or six hundred?

A. No, a few hundred, two or three hundred feet.

Q. Two and three hundred. Then in going along with the power off he had no control over his plane, except the brakes, is that it? A. That is correct.

Q. And the forward momentum of the plane?

A. His brakes and his rudder.

Q. And his rudder, yes.

Mr. Pitcairn later perished in an accident, didn't he?

A. Yes, sir.

The Court: I did not get the question and the answer, and I am sure the jury did not. [34]

(Question and answer read by the reporter.)

Mr. Lillie: I will object to that, if the court please, not material.

The Court: It is for the purpose of showing that he is not available. So that is proper.

Mr. Lillie: I see.

The Court: The jury might wonder why the particular individual was not produced.

Mr. Brewer: That was my idea, your Honor, in asking the question.

The Court: Yes.

Mr. Brewer: No further questions.

Redirect Examination.

By Mr. Lillie:

Q. I would like to clarify one point in my own mind, Mr. Virgin. When would the pilot request the control tower to send out the tractor?

A. When he was obtaining permission to land.

(Testimony of Edward Warren Virgin)

Q. When he was obtaining permission to land?

A. Yes.

Mr. Lillie: That is all, sir.

The Court: That is all. Thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Lillie: I am going to call the defendant Thomas [35] W. Scott under 43-B, if your Honor please, for cross examination.

The Court: All right.

THOMAS WARRE SCOTT

called as a witness by and on behalf of the plaintiff under Sections 43-B, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Thomas Warre Scott.

The Clerk: Is that W-a-r-e?

The Witness: W-a-r-r-e.

The Clerk: S-c-o-t-t?

The Witness: That is right.

Direct Examination.

By Mr. Lillie:

Q. Where do you reside Mr. Scott?

A. Newport Beach.

Q. What is your occupation?

A. I am in the sport fishing business now.

The Court: Repeat that answer.

(Answer read by the reporter.)

The Court: All right.

(Testimony of Thomas Warre Scott)

Q. By Mr. Lillie: On November 11, 1943, what was your occupation?

A. I was pilot for Douglas Aircraft. [36]

Q. How long had you been so employed by Douglas Aircraft Company?

A. Since June of 1942.

Q. Approximately a year and two months, is that correct?

A. Approximately.

Q. During that year and two months did you work off of the Los Angeles Municipal Airport?

A. Part of the time.

Q. How long?

A. I worked from June until December, and I was transferred to Tulsa, and I stayed back at the Tulsa plant until the following May. Then I was transferred back to the El Segundo plant.

Q. In May of 1943 you were transferred back to the—

A. (Interposing) It was April or May, I am not positive, the early spring.

Q. April or May. Does the El Segundo plant work off of Mines Field?

A. Yes.

Q. So that you then proceed to work from April or May of 1943 up to and beyond the date of this accident off of Mines Field?

A. That is correct.

Q. What type of planes were you testing between that period of April and May of 1943 and the date of the accident? [37]

A. The SBDs is all we had at the El Segundo plant. At Tulsa there were B-25s and B-24s, A-20s, A-24s.

Q. So that during that period that I asked you about you had been testing SBDs only?

Q. So that during that period that I asked you about

A. Yes.

(Testimony of Thomas Warre Scott)

Q. What kind of tests were you conducting on these SBDs?

A. Ours were just regular production tests. When a plane came off the line, we flew it to get all the bugs out, check and instruments and the motor and operation of the gear, the flaps.

Q. How long did those tests take on an average?

A. The first flight was an hour.

Q. Did you conduct only first flights? Or did you conduct a series of flights?

A. No. If the airplane was all right, an hour was enough. But if we found some that had to be corrected, sometimes we would have to fly them three or four times.

Q. Was that the type of test you were conducting at the time and prior to this accident?

A. It was a check flight, yes, the second flight, I think it was.

Q. Now, as I understand it, Mr. Scott, you came in and landed on Runway D, is that correct?

A. Well, at that time we called it "Runway R," I be- [38] lieve 25-R, the north runway.

Q. Would you be kind enough to step down to the board there? I will give you a colored pencil, and you mark approximately where you landed on this test flight at the time prior to the accident.

A. Where my wheels first touched the ground?

Q. That's right.

A. Approximately here (indicating).

Q. Will you mark that P-1?

A. (Marking diagram)

(Testimony of Thomas Warre Scott)

Q. At the time you landed there did you proceed to taxi down to the intersection of diagonal 22 and R-25?

A. No. I had had enough forward speed that I was just coasting down.

The Court: Indicate to the jury the direction that you traveled, to what point.

Q. By Mr. Lillie: And you coasted down to what point?

A. Approximately here (indicating). I was slowing when I made this turn.

Q. Will you make a mark on there when you entered the intersection? Mark that "P-2."

A. (Marking diagram)

Q. Just draw a line from it and mark it "P-2."

Now, at that time were you in touch with the control tower, Mr. Scott? [39]

A. I contacted them right approximately at this position, or he contacted me. I will take that back. I was—

Q. (Interposing) Do you recall what he said to you, Mr. Scott?

A. He told me to hold north of the main runway. I was cleared to the ramp, and to hold north of the main runway, I believe.

Q. Now, when the control tower told you that you were clear to the ramp and to hold north of the main runway, and you followed those directions, if you had followed those directions, where would you have gone?

A. Right where I did. I came down here, held north of the main runway.

Q. You would not have gone down to this point here (indicating)?

A. Not unless he directed me.

(Testimony of Thomas Warre Scott)

Q. I see. So that you then turned to your left and came down to the intersection of the main runway and diagonal 22 here, is that right? A. Yes.

Q. Will you place a mark there?

A. (Marking diagram)

Q. Did you stop there? A. Yes.

Q. What happened when you stopped there? [40]

A. Another airplane was taking off on the main runway.

Q. So you waited until that airplane took off in a westerly direction, is that right?

A. I waited until the control—until he had taken off and the control tower gave me permission to cross the main runway.

Q. Thereafter you crossed the main runway, is that correct? You did not taxi across the runway, did you?

A. I taxied.

The Court: What is the answer?

The Witness: Yes.

Q. By Mr. Lillie: Did you "S" across it?

A. No, not across the runway.

Q. Do you see the mark there, the approximate position where the P-51 was parked? Would that be about correct, within a hundred feet or so?

A. A hundred or 150 feet.

Q. After you crossed this main runway where did you start "S-ing"?

A. Just as I completed crossing the first turn I made my first turn approximately there (indicating).

Q. Then you collided with the P-51?

A. That's right.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given

(Testimony of Thomas Warre Scott)

you. You will [41] not discuss the matter among yourselves not permit anyone to discuss it in your presence. You will not form nor express any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 2:00 o'clock. Court will now recess until 2:00 o'clock.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same date.) [42]

Los Angeles, California, May 13, 1947,

2:00 o'clock p. m.

The Court: Let the record show the jury are present. Counsel for the plaintiff and defendant are in court. Proceed.

THOMAS WARRE SCOTT

the witness on the stand at the time of recess, being previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Lillie:

Q. Mr. Scott, if I recall correctly, we had you taxiing across the main runway and starting your east turn when you collided with the parked Army aircraft, is that correct? A. Yes.

Q. When you started taxiing down diagonal 22 between P-2, which is marked on the map, at the intersection, down to the point where you waited to cross the main runway, did you taxi in a straight line or did you "S" your plane so as to see forward?

A. No, I made—

(Testimony of Thomas Warre Scott)

Q. (Interposing) On that diagonal?

A. No, I made "S" turns on that strip there.

Q. Now, in making "S" turns you would have a direct view in front of you of that diagonal all the way down to the [43] end of it, is that correct? Or would you just look immediately before you?

A. No. You would just have a glimpse of it. As I turned the plane to the left, I could see out the right side. Down the diagonal I could see all the right side.

Q. Could you see all the way down the diagonal as you took your look?

A. I imagine so. I don't remember. I don't remember whether I looked that far.

Q. You don't remember whether you looked that far?

A. Not clear to the end. That was quite a ways down there.

Q. Then when you stopped your plane at the intersection of the main air strip, you testified you headed your plane in an easterly direction to watch a take-off of a plane on the east end of the main air strip?

A. That is correct.

Q. That is correct?

A. Not due east, but so I could see the runway.

Q. At that time did you look down the diagonal again?

A. I don't believe so. If I did, I don't remember.

Q. You then proceeded to turn your airplane and head it across the main strip, is that correct?

A. That is correct.

Q. And received permission from the control tower to [44] proceed? A. That's right.

Q. Now, were you in a hurry to cross that main air strip? A. Yes, sir.

(Testimony of Thomas Warre Scott)

Q. You crossed the main air strip and started your "S'es"? A. That is right.

Q. All the time you were looking to see if there was anything in front of you, is that correct?

A. I would look out the side. I couldn't see directly in front of me over the nose of the plane. I looked the best I could.

Q. The purpose of the "S-ing" (essing) was to get a clear unobstructed view of the diagonal down which you were proceeding, is that correct?

A. That is correct.

Q. And you did that? A. Yes.

Q. And you looked? A. Yes.

Q. You did not see the plane?

A. I know I didn't.

Q. And you crashed into it?

A. That's right. [45]

Mr. Lillie: That's all, your Honor.

The Court: That is all.

Mr. Brewer: Just one question.

Mr. Lillie: Might I clarify one point, Mr. Brewer? Is this redirect? I have him on cross examination.

Mr. Brewer: Yes.

Mr. Lillie: This is redirect?

Mr. Brewer: Yes, as to what you asked him.

Redirect Examination

By Mr. Brewer:

Q. Now, Mr. Scott, when did you first talk to the tower before coming down to the field?

A. You mean before I landed?

Q. Yes, that's it.

(Testimony of Thomas Warre Scott)

A. Oh, I was over in the north, over around Howard Hughes' plant in the northwest direction, I think, when I called for the first position.

Q. How did you communicate with the tower?

A. By radio.

Q. Now, was your radio when you took off tuned to the tower so they could hear you at all times when you cared to talk to them?

A. Yes.

Q. And you could hear them?

A. Yes. [46]

Q. They would put in a call number for you?

A. That's right.

Q. That was a number which you had for your plane that they used in order to call your attention to their call to you?

A. That's right.

Q. Then when you talked to the tower first before this landing was made, just what was said by the tower and by you?

A. I called the tower to give my position, and he answers and—

Q. (Interposing) What did you say to them about your position?

A. Well, I couldn't recall word for word.

Q. Well, just in substance.

A. I called, "Los Angeles Tower, this is Navy 302, over Howard Hughes at approximately 5,000 feet. Landing instructions."

Q. That meant, of course, that you wanted instructions from them as to how to land in the field?

A. Yes.

Q. In talking to the tower you used rather abbreviated language, didn't you?

A. Yes. That is set up by the CAA, the language that you use.

(Testimony of Thomas Warre Scott)

Q. Sir? [47]

A. That is set up by the CAA, the type of calls we make and the answers we make.

Q. All right. What did the tower say to you then?

A. He called, "Navy 302, this is Los Angeles Tower. You are cleared to enter the traffic pattern." And I believe he asked me to call him on the down-wind leg. I don't remember.

Q. All right. Now, what would the expression "down-wind leg" mean? Would you explain that to us, please?

A. You always land an aircraft into the wind, so I was going down-wind. As we enter the traffic pattern around the field, we are always required to go in the same direct at a certain altitude; and we generally go down-wind, past the tower and contact them there again for landing instructions.

Q. All right. Now, what was the direction of the wind on that day? Do you recall?

A. The wind was from the west.

Q. The wind was from the west. So you would have to land going west, is that correct, sir?

A. Yes, sir.

Q. And the down-wind leg would then be going east?

A. That's right.

Q. What would be the landing traffic pattern there? What direction would you fly your plane to get into the landing pattern?

A. I entered the pattern. I was traveling in a south- [48] erly direction and turned east down to my base leg, turned north until I reached the runway, and then turned west and landed.

(Testimony of Thomas Warre Scott)

Q. Now, after you got into this landing pattern did you talk to the tower again?

A. I believe I contacted them on the down-wind leg, and we received permission—and I received permission to land, but I didn't talk any after that.

Q. Did he tell you what place to land?

A. Yes. He told me to land on 25-R.

Q. 25-R. Any further instructions? A. No.

Q. Then you did land on 25-R here as you designated at "P-1"? A. Yes.

Q. And I believe you stated you went down to "P-2"? A. That's right.

Q. You stopped there, did you?

A. Oh, I don't think I stopped. I was rolling slow. I rolled around that turn.

Q. You rolled around the turn? A. Yes.

Q. When you got at that place did you talk to the tower again?

A. No. I think the tower called me and told me to hold [49] north of the main runway.

Q. And the main runway: which was the main runway here?

A. That is the wide strip "25."

Q. "25-L" here that I am pointing to? A. Yes.

Q. The main runway. It says here "300 feet wide." Is that about correct, sir?

A. I believe so, yes.

Q. What did you understand that "hold north of the main runway" to mean, sir?

A. Not to cross the main runway until I was given clearance to.

(Testimony of Thomas Warre Scott)

Q. Then when you came to a stop at the main runway there, was the plane visible from the tower?

A. Which plane was that?

Q. Yours. A. Oh, yes.

Q. It was visible from any—

A. (Interposing) Well, I say it was visible. Well, it must have been because it was a fairly clear day, yes.

Q. I mean is the tower in such a position that they can see the whole field? A. Yes.

Q. When you got to the main runway how long did you stay there? [50]

A. I don't remember. There was a plane taking off, preparing to take off; so, a matter of 30 seconds or a minute or a minute and a half.

Q. And in which direction did it take off?

A. To the west.

Q. It was then to the left of you as you stopped there at the main runway. A. That's right.

Q. Now, you have designated here your "X," it appears to me, at least, to be a little to the left side of the runway, the diagonal runway 22.

The Court: The left side, would it?

Mr. Brewer: The left side, I said, your Honor.

The Court: That would be west, would it?

Mr. Brewer: No. I think it would be east.

The Court: All right.

Q. By Mr. Brewer: Is that correct, Mr. Scott?

A. I don't know there. I just made an "X." The runway is pretty narrow.

Q. I understood you to say you faced a little east to watch this take-off.

A. I turned so I could see.

(Testimony of Thomas Warre Scott)

Q. Then after the take-off, after the take-off of that plane, did you talk to the tower again?

A. No. The tower gave me permission to cross the run- [51] way after that.

Q. What did he say?

A. "Navy 302, you are cleared across the main runway."

Q. Now, at that time, Mr. Scott, had you been testing planes for Douglas there for some time?

A. Yes, several months.

Q. And were you the only test pilot, or were there others?

A. Oh, no. There was quite a few more at that time.

Q. Quite a few more. Were you all testing SBDs?

A. Yes. That is the type plane they had there.

Q. As a matter of fact, there were quite a few of them on that field that day, were there not?

A. Yes.

Q. Where were you intending to take your plane after your landing?

A. Taxi down runway 22 to the parking strip. I believe they called that Runway C.

Q. This runway running east and west here?

A. Yes. That was our parking strip.

Q. Would that be it (indicating?)

A. That is a parking strip.

Q. That was used for that purpose at that time?

A. Yes. And I would taxi down 22 to that intersection and back up in front of the tower. [52]

Q. Back up to the east?

A. Yes.

(Testimony of Thomas Warre Scott)

Q. All right. Now, there were some planes parked there: SBDs, were there not, at the time that you landed on this particular day?

A. On the parking strip?

Q. Yes. A. Yes, sir.

Q. And some SBD planes? A. Yes.

Q. Will you indicate on the diagram, then, where these other planes were parked, Mr. Scott?

A. Well, I don't remember the exact position; but some of these were parked from one end completely up to the other. North American had just as many planes parked there as Douglas, but they would all be parked along this edge. And I taxied up this strip here (indicating).

Q. Facing out toward the field?

A. No. They would be facing in.

Q. Facing in?

A. Of course, they would pull out and taxi up here to take off.

Q. All right. How long have you been flying airplanes, sir? A. Since 1928. [53]

Q. How many flying hours have you had in that time?

A. At the time of the accident?

Q. Yes.

A. About 2,300, I think, 2,400.

Q. How many hours have you at this time?

A. 2,800.

Q. Have you had much experience with that particular type of plane before this accident?

A. Not until I went to work for Douglas. I had from it, I imagine, around 400 hours at the time of the accident.

(Testimony of Thomas Warre Scott)

Q. At the time of the accident you, of course, were familiar with that field also and had flown on it and off of it on prior occasions?

A. Yes. I flew off of it in 1928.

Q. You did?

A. Before it was an airport.

Q. I see. Had you flown different types of planes before that time, sir? A. Yes.

Q. What different types?

A. Well, from the smallest 50-horsepower on up, land and sea planes.

Q. Land and sea planes?

A. Single, multi-engine, four-engine.

Q. Had you flown any planes with more than one engine? [54] A. Yes.

Q. And how high horsepower had you ever used in the flight of a plane?

A. I think the B-17, around 6,200 at that time, was the largest one.

Q. Have you been continuously engaged in flying since '28? A. No.

Q. Well, just how many years had you spent in flying, then?

A. I flew up to about 1934 or '35, and then I didn't fly any more until 1941.

Q. What sort of license did you have at that time when this accident occurred?

A. A commercial license.

Q. This was a new plane that you were using, was it?

A. Yes.

Q. You stated this was a check flight. Do you know if this plane had been flown before? A. Yes, it had.

(Testimony of Thomas Warre Scott)

Q. About when did you take off on this flight?

A. Shortly after lunch, 1:30 or 2:00 o'clock.

Q. About how long was the flight itself?

A. Check flights are generally shorter; so it was probably 20 to 30 minutes. [55]

Q. Now, with reference to the time of your landing, what time was that, approximately, at the time of the accident?

A. I would guess around 2:30.

Q. At that time is the sun in the west there toward which you were flying at that time of year and at that time of day?

A. It would be in a westerly direction, yes.

Q. In other words, you were moving up a diagonal one way toward the sun, were you not?

A. Well, it would be towards the sun; but how directly I don't know.

Q. Now, at that time what was the color of the grass between the runways?

A. It would be a brown.

Q. Are there some low-lying hills surrounding this field to the west and north? A. Yes.

Q. What color were they?

A. They are sand. They would be a brown.

Q. What color were those buildings over there at that time; do you recall? Were they camouflaged?

A. Yes, they were camouflaged, I think part black and part brown.

The Court: You should not suggest the answer, counsel. [56] sel.

Mr. Brewer: Beg pardon?

The Court: You should not suggest the answer on your examination.

(Testimony of Thomas Warre Scott)

Mr. Brewer: All right.

Q. Do you recall what color the runways were, particularly runway 22?

A. No. They had been camouflaged. They had several different types of paint on them at one time. It was just a Duke's Mixture.

Q. How did you manage these "S" turns, Mr. Scott?

A. Well, your right brake is—the brakes on airplanes are separate, and for your right wheel you use the right pedal and for your left brake you use the left pedal. By applying the right brake you turn to the right, and by applying the left brake you turn to the left.

Q. How big was this SBD, approximately?

A. The wingspread was about 42 feet.

Q. How long was the plane?

A. Well, I would judge about 30.

Q. Between what points did you do your "S" turning there, sir?

A. After I left Runway 25-R, down runway 22—

Q. Going down runway—

A. Down there I made "S" turns.

Q. Going down from "P-2" down to this "X" mark on Run- [57] way 22?

A. That's right. And then I started them after I crossed the main runway again. I may have started a little sooner or a little later.

Q. Sir?

A. I may have started a little sooner or a little later across that runway. You see, I am always anxious to get across the runway.

Q. You were asked the question if you were in a hurry to cross the main air strip. Why was that, sir?

(Testimony of Thomas Warre Scott)

A. Just in case somebody else might be landing that I didn't see.

Q. You had worked around that field quite a while, had you not, sir? A. Yes.

Q. That was a pretty busy field at that time, was it not? A. Yes.

Q. Lots of planes landing and taking off, is that correct? A. That's right.

Q. How far would you travel in making one of these "S" turns, first to the left, then to the right, that is, to get a complete look to the right or the left?

A. That would be awfully hard for me to say. I wouldn't [58] know whether to say 25 feet or 50 feet.

Q. Well, in turning to the right and then to the left, the two turns, I mean.

A. Well, the best I could say is between 25 and 50 feet to complete a complete "S."

The wind would have something to do with that, cross wind. Speed would have something to do with.

Q. What?

A. The speed that you were taxiing would have something to do with it.

Q. I am talking about this particular day.

A. I couldn't remember.

Q. You couldn't remember that?

A. Not that far back.

Q. About how many miles per hour can you taxi an airplane in using the airplane to pull it along?

A. You mean in safety?

Q. Yes.

A. Oh, we judged it eight to 10 miles an hour is fast enough for those.

(Testimony of Thomas Warre Scott)

Q. Now, you said that this plane of yours was about 42-1/2 feet? A. Wingspread.

Q. Wingspread? A. Yes. [59]

Q. And 40 feet or whatever it was. Do you recall where you were with respect to the diagonal runway as it crossed the main runway when you did make that crossing there?

A. You mean whether I was in the center or to the one side?

Q. Yes.

A. Well, I always tried to taxi down the center.

Q. The center? A. Yes.

Q. Is that the usual practice and custom, to taxi down the center of a runway? A. Yes.

Q. You were doing that there in Runway 22, were you? A. Yes.

Q. Now, then, after you got across this main runway, do you know in which direction you turned, that is to say, whether to the left or the right first when you got off the main runway? A. No, I don't.

Q. Do you recall how many "S" turns, if any, you made after you got off the main runway before this collision? A. No, I am sorry, I don't.

Q. How high is the nose of this SBD from the ground?

A. You mean to the top of the cowling or the top of the propeller? [60]

Q. Well, I mean the cowling.

A. The cowling? Oh, I judge seven feet; seven, eight feet.

Q. How high to the top of the propeller?

A. That would be another three feet, 2-1/2, three feet.

(Testimony of Thomas Warre Scott)

Q. Now, when the propeller is revolving, can you see through that area? A. Oh, yes.

Q. With respect to this particular plane, when you were seated in the pilot's seat, could you look over the front end of the plane at all? A. No.

Q. Your only visibility to the front was by "S" turns, is that it? A. That is correct.

Q. How high was your head, we will say, seated in the pilot's seat, from the ground when the plane was in its usual position on the runway?

A. You mean with me in the seat?

Q. Yes, sir.

A. Oh, five or six feet.

Q. About how far do you make a turn to the right and left in making these "S" turns? Will you describe that, please, how much or an angle you display in making the turns?

A. I believe 15 degrees from the center. That would [61] throw me around enough.

Q. What particular color did the runway display, as a general thing, when you looked at it?

A. I would say it blended in with the background some, brown or—(Pause)

Q. Did you notice after the accident the particular color of this Mustang, P-51?

A. It has the Army khaki color on it.

Q. Did that blend in with the surrounding territory when you were any distance from it?

A. Yes, I would say so.

Q. Was that coloring of that P-51 the one solid, continuous color? Or was it mottled?

A. No, they are solid color.

(Testimony of Thomas Warre Scott)

Q. Did you notice where the Mustang was parked. Well, withdraw that for a minute.

You stated that you collided with this plane. Will you describe just how that collision took place?

A. Well, the first I knew is when my right wing hit his fin, tail fin.

Q. What fin?

A. That was the first indication.

Q. What fin?

A. Well, the tail of the aircraft.

Q. The tail. All right. [62]

A. That was the first indication I had of the aircraft.

Q. That was your right wing, did you say?

A. My right wing, yes.

Q. About where on your right wing?

A. I don't remember just where it was.

Mr. Lillie: It is stipulated, your Honor, that these pictures may be introduced into evidence as government's next exhibit in order.

Are they marked as one exhibit for identification?

The Court: How have you marked them, Mr. Cross?

The Clerk: These are marked from 3-A to 3-X, inclusive.

The Court: Admitted in evidence.

The Clerk: In evidence.

(The photographs referred to were received in evidence and marked Government's Exhibits 3-A to 3-X, inclusive.)

Mr. Brewer: What was the last question, Mr. Reporter?

(Question read by the reporter.)

(Testimony of Thomas Warre Scott)

Q. By Mr. Brewer: Mr. Scott, I have Government's Exhibit No. 3-P here. Is that the right wing of the SBD?

A. Yes, almost out to the wingtip.

Q. All right. That is what I was going to ask you. Refreshing your recollection from that, what part of the wing struck the other plane?

A. Almost to the wingtip.

Q. Almost to the wingtip? [63] A. Yes.

Q. All right, thank you. What happened then, sir? Just describe what took place after that.

A. That swung my ship around into where my left wing was collided with his left wing.

Q. Did you finish? A. Yes.

Q. Now, did you shut off your motor then?

A. Yes.

Q. Did you get out of the plane? A. Yes.

Q. Did the other pilot get out of the plane, too?

A. Yes.

Q. Did you have any conversation with him there?

A. A little bit.

Q. And he was not injured in this accident?

A. No, luckily.

Q. Did you notice that plane then in its position on the runway after you got out?

A. I noticed it was sitting on the side of the runway, headed approximately west, if that is what you mean.

Q. That is what I wanted to know: headed approximately west. By that, this diagonal No. 22 runs sort of southwest? A. Yes.

Q. But was the Mustang headed more to the west than [64] that diagonal? A. Yes.

(Testimony of Thomas Warre Scott)

Q. How far was the right front wheel of the landing gear from the edge of the paved runway? Did you notice that?

A. No, I didn't. I thought both wheels were approximately on the edge of it.

Q. Well, did your collision with that plane move it any, do you know? A. No, I don't.

Q. You don't know that? A. No, I don't.

Mr. Lillie: I might add, your Honor, that it is further stipulated that these figures, which are Government's Exhibit 3-A to 3-X, were taken within 15 to 20 minutes after the accident.

The Court: It is so understood.

Mr. Brewer: I have some pictures here, too, your Honor.

Mr. Lillie: I stipulate that they may be introduced in evidence and that they were taken a half-hour afterwards.

Mr. Brewer: Within a half-hour.

Mr. Lillie: Within a half-hour. There is some writing on the back of them which—

Mr. Brewer (Interposing): We have the man that took them here. I just want to use one right now.

Mr. Lillie: It is stipulated that they may be introduced [65] as Defendant's Exhibits, your Honor?

The Clerk: They are admitted, your Honor?

The Court: In evidence.

The Clerk: Those will be Defendant's Exhibits A-1 to A-19, inclusive.

(The photographs referred to were received in evidence and marked Defendant's Exhibits A-1 to A-19.)

Q. By Mr. Brewer: I show you, Mr. Scott, two pictures, No. A-1 and A-19, which purport to be the pic-

(Testimony of Thomas Warre Scott)

tures of the accident, after the accident before the planes were moved.

I ask you to look at that and see if that refreshes your recollection as to the approximate position of this Mustang and your plane following the accident.

A. It looks to me like its further on the runway now. I just couldn't say for sure.

Q. All right, sir.

A. I don't remember.

Q. How long did you stay around there after the accident, Mr. Scott?

A. Just a matter of two or three minutes. Flight operations came out in a car and picked me right up took me in.

Q. What direction was your plane facing following the accident?

A. I believe in a northwesterly direction after I had swung around. [66]

Q. You have stated that you landed at this airport many times before the accident.

Was it customary for the tower to notify if there were any planes standing on the runway that you were to use?

A. Yes, they generally tried to.

Q. Did the tower notify you on that day that this Mustang was standing on that diagonal runway?

A. No.

Q. Is it customary practice for airports generally to allow planes to park on the runways that are being used for landing and take-off of planes?

A. I don't believe so; but I couldn't say for all airports.

(Testimony of Thomas Warre Scott)

Q. Was there a special strip at any time that was designated for parked planes there on that field?

A. Yes. That was Runway C, as they called it. That was the parking strip.

Q. What size was this Mustang, do you know?

A. No, I have never flown one. That was a little smaller than the SBD, a 35- or 36-foot wingspread, I judge.

Q. Was it any lower in height than the SBD?

A. Yes, I think it is.

Q. They were both single-motored planes, were they?

A. That's right.

Q. Was it customary at that particular airport for the [67] tower to notify you of any obstruction on the field such as a truck or an airplane?

A. Yes, they had done so.

Q. What, generally speaking, was the damage to the two planes, just of a general nature?

A. The Mustang's empenage section, I think, tail section, was damaged, and it's left wing; and the SBD's damage was the propeller and the left wing. Well, the right wing, too.

Q. What was the nature of the weather that day?

A. It was contact weather, clear.

Q. What do you mean by that, "contact flying weather"?

A. Yes. Visibility and ceiling were unlimited.

Q. Was there any haze?

A. There was some haze. I don't remember just what the visibility was that day.

(Testimony of Thomas Warre Scott)

Q. Did the position of the sun have any effect upon your vision as you came up the runway, the diagonal runway 22?

A. I don't believe so.

Q. Did the color of the Mustang blend in in any way with the surrounding territory and surrounding colors?

A. Well, it could have. I didn't see it; so I don't know. But it is the same color as the general background.

Mr. Brewer: I believe that is all at this time.

The Court: That is all.

Mr. Lillie: I would like to ask a few more questions, if [68] your Honor please.

The Court: All right.

Redirect Examination.

By Mr. Lillie:

Q. Mr. Scott, you had operated off that field, you testified, from May or April until the date of the accident and some time beyond that, so that you had occasion to use the field many times, is that correct?

A. That is correct.

Q. Now, in your experience on that field had the tower ever warned you of any truck or other impediment in the way of your plane when you were taxiing?

A. Yes, quite often.

Q. Quite often?

A. I won't say quite often; several times, particularly when we were repairing the taxi strips along there.

Q. When they had trucks on there?

A. Yes, or they would notify us that there was another airplane ahead of us taxiing.

(Testimony of Thomas Warre Scott)

Q. Mr. Scott, I am going to show you a deposition, which I believe was taken by your counsel, Mr. Brewer, March 10, 1945, and I will ask you merely to read on page 20, the last answer, the question and answer on page 24 down to here (indicating), and see if that refreshes your recollection as to the position of the P-51 on the diagonal 22 where it was [69] parked.

The Court: Was this deposition filed before the case was filed on December 11, 1946?

Mr. Brewer: Yes, your Honor. It was under a petition to preserve testimony.

The Court: All right.

Mr. Lillie: By reason of the death of Mr. Pitcairn.

Mr. Brewer: I think it has another number.

Mr. Lillie: Yes, it has, your Honor. Would your Honor like the number?

The Court: Yes.

Mr. Lillie: It was taken pursuant to petition filed with your Honor, and it is No. 4212-O'C.

The Court: All right.

Mr. Lillie: Petition of Mr. Brewer.

Q. By Mr. Lillie: Does that help you any, Mr. Scott?

A. Yes.

Q. Now, can you clear it up and tell us approximately where the P-51 was parked in connection with the edge of the runway, that is—

A. (Interposing) It was close to the edge of the runway, his wheels were, as close as he could get, I would say.

Q. That would be the northwesterly portion?

A. Yes.

(Testimony of Thomas Warre Scott)

Q. Considering the size of this runway, which is 150 [70] feet, and the position of the parked plane, could you estimate approximately how much runway was left?

A. You mean at the time of the collision or when I was making—

Q. Before the collision?

A. Before the collision? No, because I don't know just how much I would swing from one side to the other in making those "S" turns.

Q. Maybe I didn't form my question properly.

Considering the position in which the P-51 was parked, with its wheels up to the edge of the runway, do you have an estimate of how wide and what the overall length of the P-51 was? A. No.

Q. Now, the runway is 150 feet wide. Now much space would he have been taking up on that runway?

A. Not over 30 or 35 feet, I wouldn't think.

Q. So that he would have 120 feet on the other side of him?

A. Approximately that, yes.

Mr. Lillie: That is all, Mr. Scott.

Mr. Brewer: There are two questions I can think of, your Honor.

The Court: All right. [71]

Recross Examination.

By Mr. Brewer:

Q. You stated you had a conversation with Mr. Pitcairn. Just what was said by him?

Mr. Lillie: I will object to that on the ground that anything that Mr. Pitcairn said is not binding upon the

(Testimony of Thomas Warre Scott)

government because there is no showing that he was authorized to speak for the government. He may have been authorized to pilot the plane but not to speak for them.

Mr. Brewer: If your Honor please, it is alleged in the complaint that he was acting in business of the government.

Mr. Lillie: That is correct, your Honor.

Mr. Brewer: So we certainly would be allowed to develop his statements as to what happened, and things of that nature would be admissible and binding, as to what were his actions in the case.

Mr. Lillie: If the court please, as in any accident case, statements of the employee involved in an accident would always be admissible against the employee; but it would not be admissible against his employer, nor be binding upon the employer.

In this case we do not have the employee as a party to the action, and that would be the only instance where it would be admissible; and it would be limited entirely to the employee. [72]

Mr. Brewer: I think, if your Honor please, the statements made by an agent, made within the purview of his employment, are perfectly admissible and part of the *res gestae*.

The Court: How long after the accident was the statement made by the agent of the government who was piloting this aircraft?

The Witness: Is that for me to answer?

Mr. Brewer: That is for Mr. Scott to answer. I cannot.

(Testimony of Thomas Warre Scott)

The Court: Yes.

The Witness: A matter of a minute or two, as soon as we both got out of our airplanes.

The Court: There is no well-defined rule of evidence as to just the demarcation as to when the rule of *res gestae* will apply and does not apply.

There are two questions here to be decided whether or not the statements made by this particular individual the complaint alleges was operating this plane for the government of the United States; and, secondly, as counsel points out, if it is admissible, it comes within the second rule that it is near enough to the accident while the party has not yet recovered from the shock, the theory of *res gestae* being that a statement made instantly after the shock of an accident before there is time for consideration and determination of the facts in his own interest, that is as near as we can get to the basis of the *res gestae* rule. [73]

I am inclined to believe that statements made by the pilot who was operating the plane for the government of the United States, the government being on the same footing as a corporation or an individual, and the statement having been made within a minute of the accident, there does not seem to be any motive there within that time to make any colored statements.

I am going to allow the witness to answer and allow an exception to the government because the rule is giving exceptions to all rulings of the court, anyway.

Mr. Brewer: Thank you, your Honor.

The Court: Proceed.

(Testimony of Thomas Warre Scott)

Q. By Mr. Brewer: Will you state what Mr. Pitcairn said to you?

A. I got out on the wing of my plane. He wasn't able to get out right away because my propeller was right against him.

The first thing he said, "I am glad you cut the switch," because I was well on the way of cutting him up. And when he finally got out I said, "I am sorry. I didn't see you."

Well, he said, "I am sorry. I had no business being here. I have been here for about 10 minutes. I called for a truck and they haven't come after me yet."

Mr. Brewer: I did not quite understand one phrase there. Would you repeat that for me, please? [74]

(Answer read by the reporter.)

Q. By Mr. Brewer: Do you know, Mr. Scott, what was the nature of this territory in the sort of triangular section to the west of the place where the accident occurred off of the runway?

A. I think it was mostly grass and weeds.

Q. Was it level? A. Fairly so.

Q. Was it such a place or territory that a plane could run upon it, stand upon it?

A. Oh, yes.

Mr. Brewer: I think that is all at this time.

The Court: That is all.

(Witness excused.)

Mr. Lillie: Mr. Tucker.

TOMMY TUCKER.

called as a witness by and in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Tommy Tucker.

The Clerk: T-o-m-m-y?

The Witness: Right.

The Clerk: T-u-c-k-e-r?

The Witness: That is correct.

The Clerk: Two words? [75]

The Witness: Correct.

Direct Examination

By Mr. Lillie:

Q. Where do you reside, Mr. Tucker?

A. 6353 West 84th Place, Los Angeles 45.

Q. What is your occupation?

A. I am airport engineer for the City of Los Angeles.

Q. Are you employed by the City of Los Angeles?

A. That is correct.

Q. How long have you been employed in that capacity?

A. Since the first part of 1941.

Q. Have you been continuously employed in that capacity from that date until today?

A. That is correct.

Q. Where is your place of employment?

A. I didn't hear the last question.

Q. Where is your place of employment, the location?

Are you assigned—

A. (Interposing) At the Los Angeles Airport.

(Testimony of Tommy Tucker)

Q. What is commonly known as Mines Field in Inglewood?

A. No, In Los Angeles. I have to correct you.

Q. Is that in Los Angeles?

A. It is in Los Angeles, yes, sir.

Q. Do you know whether or not at any time the government took over control of that field? [76]

A. Not absolute control, no. They took over—may I add something?

Q. Yes.

A. They took over portions of it on which they built buildings. In those portions they had a lease giving them exclusive right to those portions. The balance of the field, commonly known as the landing area, they had joint right and use of it with other tenants.

Q. So that the United States Army was merely a tenant like anybody else on that field? A. Yes.

Mr. Lillie: That is all.

Cross Examination.

By Mr. Brewer:

Q. Were you there in 1941?

A. Was I there in '41?

Q. Yes. A. Yes.

Q. What time? When did you start working there?

A. I started there, I believe, the first of March in '41?

Q. I see. Were you there at the time of Pearl Harbor?

A. That's right. That is correct.

Q. And the Army moved in, then, and took over the field and you had to have a pass to get in from then on? [77]

A. That's right.

(Testimony of Tommy Tucker)

Q. And the Western Air Defense Command from the time of Pearl Harbor on had direct control over every flight from that field and onto that field, did they not, through the Civil Aeronautics Authority, first through their own authority and afterwards through the Civil Aeronautics Authority?

A. I think you have asked two questions there. It is a little difficult for me to answer.

Q. You may separate them, if you wish.

The Court: Mr. Reporter, give him the first part.

(The question referred to was read by the reporter, as follows:

("Q And the Western Air Defense Command from the time of Pearl Harbor on had direct control over every flight from that field and onto that field, did they not . . .")

The Witness: I would say they did, for a portion after Pearl Harbor. I can't tell you when that time actually cut off. I don't know to this day when they stopped having that control.

Q. By Mr. Brewer: But that control then passed to the CAA, or the Civil Aeronautics Authority, when they ceased to exercise that control?

A. I believe you are correct in that, although the CAA has a lease with the City.

Q. They have a lease with the City? [78]

A. For the airport traffic control tower, and I believe there is some reference made in there as to their so-called responsibility and control rights.

Q. And the tower is run by the Civil Aeronautics Authority, is it not?

A. Yes, it is.

(Testimony of Tommy Tucker)

Q. And they are the ones, the direct employees of the Civil Aeronautics Authority, they are the ones who regulate the traffic in the air around the field and in the landings and take-offs? A. That is correct.

Q. They also regulate, do they not, the traffic on the air field itself?

A. The air traffic and taxiing.

Q. That is what I mean.

A. That is correct.

Q. All movements about the field?

A. That is right.

Q. Now, you said they had a joint right and use of the field with the City during the war?

A. With other tenants.

Q. With other tenants?

A. Yes: Douglas, North American, and so forth.

Q. And Douglas also had rented portions of the field for their use at that time at November 11, 1943? [79]

A. That is correct.

Q. And North American had also, I suppose?

A. That's right.

Mr. Brewer: I believe that is all.

The Court: That is all.

Mr. Lillie: That is all, Mr. Tucker.

(Witness excused.)

Mr. Lillie: The government rests, your Honor.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you.

You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence.

Do not express nor form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a short recess.

(Brief recess.)

The Court: Let the record show the jury are present and counsel are in court.

Mr. Brewer: Mr. Hansen.

OSCAR JOHN HANSEN

called as a witness by and in behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Oscar John Hansen. [80]

The Clerk: How do you spell your last name?

The Witness: H-a-n-s-e-n.

Direct Examination.

By Mr. Brewer:

Q. Speak loudly so we can all hear you, Mr. Hansen. Where do you live?

A. 5321 East Second Street, Los Angeles.

Q. By whom are you employed?

A. Douglas Aircraft Company at El Segundo, California.

Q. How long have you been employed by them?

A. Since May 1, 1941.

Q. What is your capacity there, sir?

A. I am an investigator in the Department of Plant Protection.

(Testimony of Oscar John Hansen)

Q. Were you in the vicinity of Mines Field on the date of the accident we have been litigating about here on November 11, 1943?

A. I was called there, yes, sir.

Q. Did you arrive there shortly after the accident?

A. I did.

Q. Did you inspect the planes when they were right together in their position as they were, following the impact?

A. I did.

Q. Will you just state in a general way how they were enmeshed or drawn together? [81]

A. The right wing of the Douglas SBD had struck the tail structure of the P-51 causing the SBD to whip or turn to the right, allowing the left wing of the SBD to pass over the top of the left wing of the P-51.

The propeller of the SBD was within a matter of inches from the fuselage of the P-51.

Q. Were there any skid marks or marks upon the pavement there to indicate the application of the airplane brakes of either plane?

A. There were.

Q. Where were they, sir?

A. They started immediately north of northeast of the tail section of the P-51.

Q. In what direction did they extend?

A. They extended southwest, and the left wheel of the SBD made a large circle facing nearly northwest.

Q. Where did the northwesterly end of that circle lead to? What object?

A. It led to the P-51 airplane.

Q. Was it close to the wheel of either plane?

A. Yes. The left wheel of the Douglas ship was within a few feet of the left wheel of the P-51.

(Testimony of Oscar John Hansen)

Q. Now, did you observe where the Mustang was with reference to the edge of the pavement so far as the wheels of that Mustang? [82]

A. I did.

Q. About how far was the right-hand wheel of the Mustang from the northwesterly edge of the pavement of Diagonal No. 22?

A. I would say about 30 feet.

Q. Did you cause some pictures to be taken of the scenes there at the time or immediately following the time you got there?

A. Yes, sir. I took a Douglas Company photographer with me, as is the custom with any crash or damage.

Q. You have looked over these pictures in the interim when we took this adjournment, have you not?

A. Yes.

Q. And the legends that you have on the back?

A. Yes, sir.

Q. Do you remember these pictures being taken?

A. I do.

Q. At the time, sir? A. Yes.

Mr. Brewer: Counsel has seen them.

Mr. Lillie: Yes.

Q. By Mr. Brewer: I want to show you, then, these pictures, which are now in evidence, I believe—

The Court: That is right.

Mr. Brewer: Are they in evidence, your Honor? [83]

The Court: They are in evidence.

Q. By Mr. Brewer: All right. I show you first Exhibit A-1.

(Testimony of Oscar John Hansen)

Will you observe the legend on the back and tell us what that picture represents and identify the objects in it?

A. The photograph shows both airplanes as they were after the collision before being moved.

Q. Now, the tail section, which is in the right-hand side of the picture—of which plane is that tail section?

A. That is the P-51 airplane.

Q. You see a walking man in the right-hand side of the picture. Where is that man? Close to what object?

A. He is close to the right-hand wing of the P-51 airplane.

Q. With reference to the edge of the paved runway, where is he with reference to that object?

A. He is walking within three or four feet of the edge of the runway.

Q. Now, is he on the runway or off of it?

A. He is on it.

Q. In other words, the right-hand wing, the end of it, did not reach to the edge of the pavement; is that correct, sir?

A. That is correct.

Q. Now, the next exhibit, No. A-2: will you take a [84] look at that and look at the legend on it and tell us what is shown and what the objects are in it?

A. This photograph was taken looking from the nose end of the P-51 airplane or looking northeast. The photograph was taken to show the damage to the P-51 wing which was caused by the radar antenna which extended below the SBD wing.

This photograph also shows the large skid mark of the left wheel of the Douglas ship.

(Testimony of Oscar John Hansen)

Q. That is the circular mark on the pavement, is that correct? A. That is correct.

Q. Now, the wing that extends toward us in this picture, the end of it, which plane is that?

A. That is the SBD.

Q. In other words, these two planes ended up with the SBD having the nose right up against the fuselage of the other plane and back of the wing of the other plane? A. That is correct.

Q. I show you Plaintiff's Exhibit A-3 and I ask you to look at the legend on its and the picture itself and tell us what objects are there shown.

A. That is a view of the nose end of the SBD taken before either ship was moved and shows damages to the right wing where it struck the tail section of the P-51 airplane. This photograph also shows a wheel skid mark right there (in- [85] dicating).

Q. A wheel skid mark. Was that leading up to any of the wheels of these planes?

A. I am not in a position to say.

Q. All right.

A. Whether it is or not.

Q. All right. Now, does that show the edge of the pavement there? Or can you make it out in that picture? A. No, you cannot.

Q. All right. By the way, what direction was this picture taken from?

A. That photograph is looking southeast.

Q. In other words, the photographer was standing on the runway or off of it?

A. Yes, he was on the runway.

(Testimony of Oscar John Hansen)

Q. On the runway. Now, we have an exhibit here, No. A-4. Will you look at that and tell us what that is supposed to represent?

A. This photograph was taken after the ships had been moved apart with a view of determining the damage, if any, to the fuselage or body of the airplane. There was a wrinkle or ding in the skin covering the ship.

Q. That is, the Mustang, is that right?

A. Yes, it is.

Q. All right, sir. I show you Exhibit A-5 and ask you [86] to tell us what that is, sir.

Look at the legend, too, will you, please?

A. A-5 shows the P-51 airplane after the two ships had been disentangled. It shows the damage caused by the radar rake of the left wing on the SBD.

Q. All right. That is Exhibit A-6. I wish you would mark which is the top of that. Will you mark "Top" with a pencil so we can get it right?

A. (Marking document)

Q. Thanks.

A. This photograph shows damage to the radar rake and the leading edge of the SBD wing. This would be the right-hand wing which struck the tail section of the P-51.

Q. All right, sir. Thank you. Will you mark the top of this, too, please, so we won't be misled?

A. (Marking document)

Q. Thanks. And tell us what that is, please. That is Exhibit A-7.

A. This is the nose section of the SBD taken to show damage to the propeller and/or the propeller blades, I should say. That is all.

(Testimony of Oscar John Hansen)

Q. That is all? All right, sir. Now, Exhibit A-8: Will you tell us what that shows?

A. This photograph shows the SBD wing, left wing, over the top of the P-51 left-hand wing and was taken before [87] either ship was moved.

Q. What are the objects on the ground, sir?

A. These are chunks of metal which were torn out of the P-51 wing which the radar rake passed through. It happened right in there (indicating).

Q. There is a light streak in the back of the picture. What is that, sir?

A. That is the far side of that runway.

Q. There is something setting back there. Do you know what that is?

A. That is North American's investigators who came out to photograph the same accident.

Q. It is a camera, is that correct?

A. That is correct.

Q. I see. Do you know where that is standing with reference to the paved edge of the runway?

A. I would say it is approximately in the center of the paved runway.

Q. The center of the paved runway?

A. Yes, sir.

Q. Thank you. Now, this is Exhibit A-9. Will you look at the legend and tell us what that shows?

A. It shows the underside of the SBD wing which passed over the top of the P-51 wing.

Q. Was this taken before they were moved, sir? [88]

A. That was taken before the ships were moved.

(Testimony of Oscar John Hansen)

Q. Did I ask you that same question about No. A-8? Was that taken before the ships were moved?

A. That was taken before either ship was moved.

Q. Thank you. And this other structure extending under that wing, is that the P-51 wing?

A. That is the P-51 wing.

Q. Thank you. I show you now Exhibit A-10. Will you look at the legend on that and look at the picture and tell us what the objects are in it?

A. This photo shows the P-51 airplane after the two ships had been disentangled. It was taken primarily to show damage to the tail section, horizontal stabilizer and the buckling of the metal forward of the horizontal stabilizer. This shot was taken before the ship had been towed away from the scene of the accident.

Q. Were you there when the two ships were disengaged?

A. I was.

Q. In disengaging the two ships, was the P-51 moved in any way?

A. No. It was necessary to back the SBD off of the P-51.

Q. So that that would correctly illustrate the position of the P-51 also at its position following the impact?

A. That is correct. [89]

Q. Now, I see a darker strip alongside of the paved portion that the P-51 is resting on. Will you tell us what that is with the white strip beyond it?

A. That is grass, and the white strip is an automobile roadway. That runs parallel.

Q. Now, the grass there: would that exhibit the edge of the paved portion of the Diagonal 22?

A. That would.

(Testimony of Oscar John Hansen)

Q. I show you Exhibit A-11, Mr. Hansen. I will ask you to look at the legend and tell us what it shows.

A. This photograph was taken before either ship was moved after the impact and shows again the SBD left wing over the P-51 left wing and was taken to determine the damage. This also shows a fire truck parked ahead of the P-51.

Q. Now, I want to ask you about that fire truck. Had the ships been moved at that time?

A. No, they had not.

Q. Was that fire truck on the paved Diagonal 22 runway? A. It was.

Q. I notice a sort of a dark streak there beyond this airplane, the wheels of the P-51 and a white streak beyond it. Will you tell us what that was again?

A. The dark streak designates the grass at the edge of the runway, and that white streak again is that automobile [90] roadway which runs parallel to it.

Q. Thank you. Now I show you picture A-12 and ask you if you recognize that and what is in it.

A. That photograph shows the P-51 airplane just before it was towed away from the scene of the damage. The ship had not been moved, although the tractor had backed up and hooked onto it.

Q. Now, does that picture correctly exhibit that both wheels of the P-51 were some distance in from the edge of the runway? A. They do.

Mr. Lillie: I will object to that on the ground it is assuming something not in evidence. If Mr. Brewer means after the impact, I have no objection.

Mr. Brewer: Well, of course, that is what I do mean, counsel.

(Testimony of Oscar John Hansen)

The Court: That is self-evident. Proceed.

The Witness: That shows the ship after its being pulled away from the point of impact.

Q. By Mr. Brewer: That is the P-51?

A. That is correct.

Q. That is A-13. Now I show you Exhibit A-14. Is that a picture taken before the ships were moved, sir?

A. That is correct.

Q. What is exhibited there, please? [91]

A. It again shows the position of the SBD wing over the top of the P-51 wing and underneath both airplanes you can see the edge of the runway, denoted by a dark streak there which is grass.

Q. All right, thank you. Now we have Exhibit No. A-15. I ask you to look at that, please.

What does that exhibit in there?

A. That was a long shot to show as much as possible the full size of both airplanes and the skid marks on the pavement. It shows the right-hand side of the SBD, and the nose section of the SBD within a matter of a few inches of the P-51. That is the propeller blades. Forward of both ships and to the right is parked the fire truck.

Q. Is that the same fire truck and in the same position as is shown in the other picture? A. It is.

Q. Thank you. That was taken before they were moved, was it not? A. That is correct.

Q. I show you now A-16. Will you look at that, please, and tell us what that is?

A. It shows the pavement and the wheel section of the SBD and also the tail of the P-51. It shows the brakes were applied by the Douglas pilot at about the time of impact.

(Testimony of Oscar John Hansen)

Q. This long circular black streak leads up to the [92] wheel of the SBD. What was that?

A. Well, that would be the tire or rubber burn where the wheel had skidded.

Q. Now, I show you Exhibit No. A-17. Will you look at that, please, and tell us what is in it?

A. That is the P-51 airplane, showing the damage to the left-hand wing after the ships were disengaged; and the far side or the edge of the runway can be seen between the mechanic and the wing.

Q. All right, sir. Was that before the P-51 was moved?

A. That's right.

Q. Now we have Exhibit A-18. Will you tell us what that is?

A. That is another long shot of both airplanes before either ship was moved. It was taken from the southeast looking to the northwest and shows the tail end of the fire truck and some of the moving equipment.

Q. Now I show you Exhibit A-19. I ask you to look at that, please, and tell us what is shown there.

A. That is looking from the southeast to the northwest. It shows both SBD and P-51 airplanes before they were moved and the distance from the right-hand wheel to the edge of the runway as shown.

Mr. Brewer: I would like to have this witness mark the two wheels of the P-51. Do you mind, your Honor? [93]

The Court: He may mark it.

Q. By Mr. Brewer: All right. Will you draw a line out to the left and mark "Left wheel of the P-51" there clear out into the white, please?

A. (Marking exhibit)

(Testimony of Oscar John Hansen)

Q. Just right out "left wheel."

A. That is the right wheel. I was mistaken.

Q. The left wheel, then, is not shown?

A. Yes, it is shown on this side.

Q. Oh! All right. Well, put out there in the same way and mark it "left wheel."

I show you a couple of pictures here and ask you if you recognize those. A. I do.

The Court: Have they been marked?

Mr. Brewer: No, they haven't.

The Court: Mark them for identification.

Mr. Brewer: Yes. Will you mark them, Mr. Cross?

The Clerk: Yes. Defendant's Exhibits B-1 and B-2 for identification.

(The photographs referred to were marked Defendant's Exhibits B-1 and B-2 for identification.)

Q. By Mr. Brewer: Were you present when these pictures were taken, sir? A. I was. [94]

Q. Do you recognize the scene in them?

A. Yes.

The Court: What is the witness referring to?

Mr. Brewer: Exhibits B-1 and B-2.

Q. Are they the same? A. They are the same.

Q. What scene is it that is represented by this picture?

A. These photographs show the width of the main runway or landing strip. That is the large one (indicating).

Q. Is that the diagonal?

A. No, that is not the diagonal.

Q. That is the big one? A. That's right.

Q. I see. All right. And when were they taken?

(Testimony of Oscar John Hansen)

A. They were taken, oh, within two hours after the accident occurred on the field.

Q. The same day? A. The same day.

Mr. Brewer: All right, sir. We will offer them in evidence, your Honor.

The Court: In evidence.

The Clerk: Exhibits B-1 and B-2 in evidence.

(The photographs referred to were received in evidence and marked Defendant's Exhibits B-1 and B-2.) [95]

Mr. Brewer: You may cross examine.

Cross Examination.

By Mr. Lillie:

Q. Did you take these pictures, Mr. Hansen?

A. No, sir.

Q. You did not? A. I did not.

Q. Were you there at the time they were taken?

A. I was.

Q. Were they taken simultaneously, one right after the other?

A. One right after the other.

The Court: I am sure the jury are not hearing those questions.

Q. By Mr. Lillie: I notice that one is much darker than the other. Can you account for that? Is that by reason of the photographer?

A. I am not an expert photographer, sir. I couldn't honestly answer you that.

Q. You are not an expert photographer. Do you know whether or not this picture taken here is of the main runway, which is 300 feet, or the runway upon which the accident happened?

(Testimony of Oscar John Hansen)

A. That is the main runway.

Q. That is not the runway upon which the accident hap- [96] pened?

A. I am pretty sure it is not.

Q. Well, now, do you know?

A. I won't say that I do know.

The Court: A little louder. I am sure the jury cannot hear you.

The Witness: I won't say that I do know.

Q. By Mr. Lillie: So you don't know whether or not that picture represents the main runway or the runway upon which the accident occurred?

A. That's right.

Q. How long after the accident did you arrive at the scene, Mr. Hansen? A. Within 10 minutes.

Q. You don't know how far the planes had been moved by reason of the collision? A. No, I don't.

Q. I will show you the Government's Exhibits 3-A to 3- —

The Clerk: 3-X.

Q. By Mr. Lillie: (Continuing)—to 3-X. Will you look them over and tell me if they represent a fair reproduction of the pictures that you took of the scene of the collision and the position of the planes?

A. This was before either— [97]

The Court (Interposing): I do not think that question is proper. Read the question.

(Question read by the reporter.)

The Court: Not a reproduction of his pictures.

Mr. Lillie: I will reframe the question.

The Court: It is a fair representation of the scene as he saw it.

(Testimony of Oscar John Hansen)

Q. By Mr. Lillie: A fair representation of the scene as he saw it and as taken in your pictures?

The Court: "And as taken in your pictures" should be stricken out.

Mr. Lillie: Very well, it may go out.

The Court: This is to find out whether or not this is a true representation as near as he remembers it of the scene at the time that he arrived.

The Witness: I would say they were.

Q. By Mr. Lillie: Thank you. It is stipulated that these were taken within 15 to 20 minutes after the accident occurred. Would you say that on an average they represent the true visibility as could be reproduced by a picture? A. I do.

Q. I call attention to Government's Exhibit No. 3-N and ask you whether or not that will help you to recollect what color the air strip was.

A. I can't truthfully say. [98]

Q. These pictures will not tell either, will they?

A. No.

Mr. Lillie: Thank you. That is all. May I pass these to the jury, your Honor?

The Court: Yes, you may.

Mr. Brewer: May we pass the others to the jury at the same time, your Honor?

The Court: Yes.

(Witness excused.)

Mr. Brewer: I do not think I will pass those, your Honor. He says he is not sure. In fact, with your consent, I will withdraw them.

Mr. Lillie: Very well, your Honor.

The Court: Call your next witness.

Mr. Brewer: I want to call Mr. Buckles, please.

ROBERT E. BUCKLES,

called as a witness by and in behalf of the defendant, under Rule 43-B, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert E. Buckles.

The Clerk: How do you spell your last name?

The Witness: B-u-c-k-l-e-s.

Mr. Brewer: Your Honor, we are calling this witness under Rule 43-B as an agent of an adverse party. [99]

Direct Examination.

By Mr. Brewer:

Q. Where do you live, Mr. Buckles?

A. 118 East 105th, L. A.

Q. A little louder, will you, please?

A. 118 East 105th, L. A.

Q. By whom are you employed?

A. United States Civil Aeronautics Administration.

Q. That is a branch of the United States Government, is it not?

A. Correct.

Q. How long have you been employed by them, Mr. Buckles?

A. Since January, 1942.

Q. Have you been stationed at Mines Field in Los Angeles since that time?

A. Well, up to July, 1944. I had "Greetings" from the President.

Q. You say you are not there at present?

A. No. Well, I am there now. I was in the Army two years.

Q. Yes. All right. And what was your capacity there at Mines Field after you came there?

A. Tower operator.

(Testimony of Robert E. Buckles)

Q. Sir? [100]

A. Tower operator.

Q. Were you in charge of the tower there?

A. No, just in charge of a shift.

Q. One shift? A. That is correct.

Q. How many shifts do they have?

A. We had three.

Q. Three? A. Yes.

Q. So that there was someone on hand at all times in the tower. Where is the tower located at that field, Mr. Buckles?

A. At the time of the accident it was on the south side. It is on the north side now.

Q. Do you see the diagram on the board from where you are? A. Yes.

Q. Was that in the administration building, the tower?

A. That is where it used to be, yes.

Q. At that time, at the time of this accident on November 11, 1943, it was in this administration building to which I am pointing?

A. That is correct.

Mr. Brewer: Could I shade this in, your Honor, just to identify what I was pointing out? [101]

The Court: Yes.

Mr. Brewer: I will shade it in with red pencil.

Q. Where was the tower located in that building?

A. It was on the very top floor.

Q. From the tower could you look out and see the field when visibility was very good?

A. We could see most of it, yes.

Q. Could you see all of runway 25-R, as it is now designated? A. Yes.

(Testimony of Robert E. Buckles)

Q. Could you see all of runway 22, the diagonal, as it is now designated?

A. Yes, you could—

Q. Sir?

A. Yes, you could see the full length of that.

Q. How about the main runway 25-L?

A. You could see it.

Q. You could see all of that, couldn't you?

A. You could see the entire length of that also, yes, sir.

Q. All right. Now, in the tower there at that time you had radio equipment, did you not?

A. Correct.

Q. Tell us about that radio equipment. How was it managed and how was it tuned in so far as being able to use [102] it in connection with your work there?

A. We had a transmitter that transmitted on 272 kilocycles.

Q. A little louder, please, Mr. Buckles.

A. Yes. We transmitted on 272 kilocycles which was the frequency assigned by the Federal Communications Commission. We received 3105 which happened to be the frequency that Mr. Scott was transmitting on the SBD. We also received 4495, 126.18 megacycles, 3117- $\frac{1}{2}$ and 6210, other frequencies on request.

Q. Now, do you recall those frequencies that you have stated, how they were used in so far as separation of the different types of planes that used the different frequencies? Do you recall that?

A. Well, see, you could say that the Navy used 3105 more than any other frequency.

(Testimony of Robert E. Buckles)

Q. Yes?

A. And some of the Army used 6210, 4495 and 126.8 megacycles.

Q. In other words, they were on a different frequency than the Navy?

A. Well, not necessarily, no. Well, some of the Navy ships transmit on 126.18 megacycles, also transmit on 6210. Let's see. I believe the A-24, which was the Army version of the SBD, also transmitted on 3105. I wouldn't be certain of [103] that. I don't remember.

Q. Well, take it this way, then: How did you know when a call was going to come in from one of these various frequencies?

A. Well, I would never know. You just simply listen for it.

Q. Well, you would hear all calls then?

A. Well, normally you would hear calls all over the area, and you might hear them skip beats clear to New York, so far as that goes.

Q. Well, what I am getting at is this: Was the receiving instrument that you had in your tower tuned to any particular band?

A. Yes. That is what I said. They were tuned to those various frequencies.

Q. Each one of them at the same time?

A. Yes, that is correct.

Q. So you could hear them all at the same time?

A. That is correct.

Q. Could you tune any of them out?

A. No, we wouldn't do that.

Q. You would not do that?

A. No.

Q. You could hear them all?

A. Yes, sir. [104]

(Testimony of Robert E. Buckles)

Q. So a fair statement to make is that you were in contact with the planes in your area and for some distance beyond?

A. Yes, you might say that. However, say two aircraft would call on the same frequency. Then somebody would have to call over again because if they had called on the same frequency, they would block each other out.

Q. You would get a mixture of voices?

A. No. I would just simply make a squeal.

Q. It would make a squeal? A. Yes, sir.

Q. All right. Well, then, did you keep any records of your conversations with planes out there?

A. Everything we transmitted is recorded, was and is.

Q. That is, the out-going part of the conversation?

A. That is correct.

Q. Was the in-going part of the conversation recorded? A. No.

Q. How was that recorded?

A. We have dictaphone recorders up in the tower. The records are small loops; so every time we transmit, we hit the microphone button and it automatically starts a record and starts recording our conversation.

Q. Now, as to planes approaching that field to land, did you control their flights, their approach and their landing by instructions from the tower? [105]

A. Yes, that is correct.

Q. That was true on November 11, 1943, was it not?

A. Correct.

Q. So that no plane could approach and land there without following the instructions which you gave them?

A. They were supposed to, yes.

(Testimony of Robert E. Buckles)

Q. And you also controlled the traffic on the field yourself, did you not?

A. Yes, that is correct.

Q. By radio and other instructions? A. Yes.

Q. And the planes, all the military planes, were equipped with radios which were capable of tuning in the frequencies you used?

A. No, I wouldn't say that. Anybody that had a receiver on 204 band could receive the tower because there were no civilian aircraft at that time.

There were no civilian aircraft using the air at that time, were there? A. No.

Q. Do you know why that was?

A. Yes. On December 7th we were attacked at Pearl Harbor, and at that time the Western Flight Command put through the regulation that no civilian aircraft shall fly within the boundaries of a certain area, and that area extended [106] east farther than the State of California.

Q. Yes, sir. Now, a plane taking off was also under your control from the tower? A. Yes.

Q. Giving instructions on what to do in taking off?

A. Yes, that is correct.

Q. When the plane landed or took off, you told him what portions of the field to use in taking off, did you not?

A. We gave him clearance to do so, yes. We didn't tell. We gave him clearance to do so.

Q. Well, just explain that phrase to us.

A. Well, "clearance" is, I guess you could define it, giving permission to do so.

(Testimony of Robert E. Buckles)

Q. In other words, the Civil Aeronautics Authority controlled traffic of the airplanes in and out of that airport at that time and during the time you have been there? A. Yes, that is correct.

Q. Do you remember this accident? You remember this accident, don't you?

A. I remember it fairly well, yes.

Q. The Mustang, P-51, planes that they were using there at that time were equipped with radios, weren't they? A. Yes.

Q. And the one that was in the accident was equipped [107] with a radio so that you could talk to him? A. Yes, that is correct.

Q. He had cleared from that field that day, had he not? A. Yes.

Q. And, of course, the Douglas SBD had also cleared from that field that day, had it not? A. Yes.

Q. And you talked to them on the radio?

A. Yes.

Q. Now, we have subpoenaed some records of the Civil Aeronautics Authority of the Department of Commerce with reference to the conversations had that day, and there was a transcript made up from it, was there not? A. Yes.

Q. Have you compared this transcript with the actual recording there, sir?

A. Well, the first transcript I was right there helping out when we made it and—(Pause)

Q. Well, would you look at this and see if this is the one to which you are referring?

A. (Examining document)

Q. This is another sheet of it. A. That's it.

(Testimony of Robert E. Buckles)

Q. Does that transcript appear to be a correct trans- [108] cript, then, of the conversation with the tower?

A. It appears so, yes.

Q. You were in charge at that time, weren't you?

A. In charge of the shift, yes.

Q. This transcript, then, is a recordation or is a transcript of the recordation of the voices that went out over the radio prior to the accident?

A. Yes, that's right.

Q. Of course, it does not contain the replies of the pilot, does it?

A. No, no.

Mr. Brewer: We would like to offer this in evidence, your Honor, as our next exhibit.

The Court: In evidence.

The Clerk: That will be Defendant's Exhibit C in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

Q. By Mr. Brewer: I will ask you to follow me with this Defendant's Exhibit C, then, please. I have a copy of it here.

A. Okay.

Q. You have up here at the top "November 11, 1943, 1407 Pacific—Actual Time of Accident."

What do you mean in clock time? [109]

A. That means 2:07 Pacific Time.

Q. Two what?

A. 2:00 o'clock, seven minutes after 2:00 o'clock in the afternoon Pacific Time.

Q. That was the time of the collision?

A. Yes.

Q. All right. Then you have the first entry:

"(To P-51)"?

A. Yes.

(Testimony of Robert E. Buckles)

Q. Is that the P-51 that Mr. Pitcairn was flying?

A. That is the P-51 that Mr. Pitcairn was flying.

Q. Now, will you take that first entry there, the first four lines there, and read them to us and explain each line as you read it?

A. Yes. First it was: "Army 093. West of the field 2500 cleared to enter the traffic pattern, runway 25. Call base leg. Over."

The "over" means for him to come back with a reply.

Q. Now, with reference to that statement, just to make sure we understand it, sir, that is what was said by the tower to the P-51?

A. That was said by me, yes.

Q. Sir? A. Yes, that is correct.

Q. And you have sort of a special language of your own, [110] don't you, in abbreviation of what you have to say to the pilot; isn't that correct, sir?

A. Well, I guess you would call it abbreviation, yes.

Q. "Army 093" means the number of the plane, does it? Or what?

A. Yes. There was a longer number for the aircraft. 093 were the last three numbers which the pilot was using for a call number. That was all we were required to use, was the last three numbers.

Q. I see. Then the words "West of the field 2500 cleared to enter the traffic pattern," just what does that mean?

A. He was west of the field; his altitude was 2,500 feet.

Q. What do the words "cleared to enter the traffic pattern" mean?

A. We had a traffic pattern, which is the flight of the aircraft in the control zone of the airport. It is

(Testimony of Robert E. Buckles)

the air space which we have to control in the airport. At that time it was three miles from the center line; so we had a definite flight pattern for them to fly which all pilots at the field knew about. So I gave him clearance, permission to enter the traffic pattern. That was to enter the traffic pattern for runway 25 which was the main runway at that time.

Q. That was the main runway at the time? [111]

A. Yes, that is correct. It was not called "25-L" at that time.

Q. Well, let us make that clear, please. When you told him "runway 25" you meant this runway A that I am pointing to here?

A. Yes. That was called runway 25.

Q. And it is now called 25-L?

A. Yes. It has been changed.

Q. All right. So that meant he was to enter the traffic pattern and get ready to land.

A. For the main runway.

Q. The main runway?

A. Uh-huh. And then I had him as a check for his position in case some other aircraft had beat him into the traffic pattern, or something like that, to advise me on base leg, in other words, his leg just before he turned in to land. I asked him to call me on base leg, and I came back with "over" for him to reply if he received it okay.

Q. Do you recall what he said in reply?

A. Well, he probably came back and said, "Los Angeles Tower, Army 093. Roger."

Q. What does "Roger" mean?

A. That means that he received.

(Testimony of Robert E. Buckles)

Q. He is hearing you all right and he understands it?

A. He received his instructions okay. [112]

Q. Now, I was curious about this next entry. It says "105 Los Angeles Tower. Cleared to runway 25."

What does that mean, sir?

A. Well, if we happened to hit the mike button a little too fast, it takes the recorder a little time to pick up, so that actually that could have been Army 105 or it could have been Navy 105. So the first part of that was evidently chopped off, and it never got on the recorder. It went out through the air but the recorder wasn't turning around.

Q. What I was getting at, was that another plane that was talking?

A. That was another aircraft that called.

Q. And it says following that, "Cleared to runway 25." Now, what did that mean?

A. In other words, that aircraft was going to take off, and I cleared him to the head of the runway to take off.

Q. I didn't quite hear you, sir.

A. I say that the aircraft had evidently called me for permission to take off; so I cleared him to the head of the runway 25 for take-off, the main runway.

Q. Well, there are about two and a half sheets of this here. How long did all of this take, in point of time, all of these entries that you have brought here?

A. Well, that is rather hard to state, it's been so [113] long. I can't remember. However, I will state that one record will carry 30 minutes of continuous conversation. In other words, one loop or record will record 30 minutes of continuous conversation.

(Testimony of Robert E. Buckles)

However, if there is an interval between your different contacts why, of course, they all run together. In other words, 30 minutes of actual conversation could run over a period of an hour and a half. Or if you were talking all the time, like we do now once in a while, why, it could use up in 30, 35 minutes.

Q. The machine stops recording when you are not using it? A. Yes, that is correct.

Q. Then you have "095 Los Angeles Tower. Cleared to runway 25. Over."

That is the next entry.

A. Yes. That was another aircraft going to take off.

Q. And that was the same runway, then, that the Mustang, the P-51, was going to come in on?

A. Correct.

Q. Now, the next entry: Will you read that and explain it to us, please?

A. Yes. At that particular time there was a B-17 that was piloted by an Army pilot. It was coming into Los Angeles. He was unfamiliar with the area. He advised that he had the field in sight; he was wanting to land at Los [114] Angeles Airport. So I advised him that he was over the field, as it states here. As soon as he was over the field and wanted the landing instructions, I came back and I said—the Army part is chopped off here—"Army 0758. This is Los Angeles Tower. Over the field, cleared to enter traffic pattern, runway 25. Call base leg . . ." And I came back and I gave him the traffic in the air.

"Traffic is a B-25 now turning on base leg and a P-51 on down wind (leg)."

(Testimony of Robert E. Buckles)

Q. What do you mean by "base leg," sir?

A. Can I show you on the map?

Q. Yes, if you will.

A. We land all aircraft into the wind, naturally.

Q. Yes, sir.

A. So if an aircraft—now, this is the air space above it (indicating).

Q. Will you kind of face the jury?

A. This is the air space above the field. We are looking down at the field straight from a vertical position. So we will draw a three-mile radius from the center line of the airport, and that is the control zone that the tower took care of. So then we had a traffic pattern. If an aircraft would enter right about here, or he could enter any part of that leg, that leg we called the "down wind leg." In other words, if the wind was blowing in this direction and he [115] landed into the wind then they were down here, it would mean they were going down-wind. So this is the down-wind leg, and in a rectangular pattern he would come here and turn here. When they turn here, it would be their base leg; and when they turn here, it would be their final approach.

So the reason we always had them on base leg or down-wind leg was maybe there would be some aircraft that would be delaying for his take-off. Maybe he had a little trouble getting in his position. We would have him advise. So maybe we would have to change him to run 25 right, or as the case may be, this aircraft I cleared for 25: "Advise base leg." So supposedly in that case the aircraft would get on base leg, and then we would either change his flight path for him

(Testimony of Robert E. Buckles)

to land on 25 right or clear him to land on the runway that we had already cleared him for. That is the leg. This leg going across here is called the cross-wind leg. We never use that.

Q. In other words, you advised them of the other traffic in the air or the other traffic on the field if there was some moving traffic or some traffic on the field, as a rule? A. That would—

Q. That might affect their passage on or off the field?

A. That's right. It would depend on our judgment how it would affect their passage. [116]

Q. Yes. Now, skipping down a little ways there, you have something "(To P-51.)"

Will you read that, please, and explain it to me.

A. Okay. This is also Mr. Pitcairn, and he has now gone on his base leg in the traffic pattern. He advised—he possibly came in this—he said, "Los Angeles Tower. This is 093. Base leg."

Then I came back with this last remark:

"093, Los Angeles Tower. Over. 093 Roger Wilco. Navy 305. Cleared to runway 25."

In other words, I had cleared up my traffic on the runway; so he had been given permission to land on the main runway.

Q. Then you have right after that entry another one to a Navy ship. A. Uh-huh.

Q. What does that mean, sir?

A. That is "Navy305. Cleared to runway 25."

It was another aircraft that was going to take off.

Q. That was the same runway? A. Yes.

(Testimony of Robert E. Buckles)

Q. Was there some interval of time? Or where was that ship?

A. That aircraft was on the ramp, and he wanted permission to taxi out on the runway. [117]

Q. Where would that ship be, sir?

A. I will show you. In other words, at that time we had aircraft parked all over the field. Douglas parked a lot of their SBD's in here. They also had some parked on a parking space which is right here (indicating).

Q. On runway C you indicated is where they had some parked?

A. Yes, they had some parked. And this aircraft called me at the tower and asked for permission to taxi to runway 25. When the aircraft called me I would say, "Navy 302. Cleared to runway 25." And he would taxi to here (indicating) and we would have several aircraft holding here and clear them.

Q. That is what we call the taxi way on the edge of the field? A. That's right.

Q. All right, sir. Now, you have another entry there, sir, the next entry being "R-716." Will you read that and explain that to us, please?

A. Yes. That "R" means Army which is—

Q. That means Army? A. Yes.

Q. All right.

A. Somebody in transcribing this put the "R" instead of the full word. So we have Army 716. He was evidently asking where the transient Army parking area was; so I came [118] back and said "Army 716, the transient parking area is behind the large hangar in the southwest corner of the field."

(Testimony of Robert E. Buckles)

Q. That was for someone who was not acquainted with the field?

A. That is correct, a transient aircraft.

Q. Now, will you explain the next entry there, "Navy 519"?

Read that to us and tell us what it means.

A. Well, it is rather hard to say what that is exactly because we don't have the first part of the transcription here. But evidently, gathering from what my conversation states there, it was an aircraft that was ready for take-off, and he asked for take-off. So I came back and I said:

"Navy 519, Los Angeles Tower. Hold your position. I have P-51 final approach."

So I held him because I had a P-51, and I couldn't allow him to take off because there was a P-51 on final approach.

Q. And that P-51 was Mr. Pitcairn's plane, wasn't it?

A. From the rest of it, I would say that it was Mr. Pitcairn's plane. But, as I said, I couldn't be certain because I can't remember back that far.

Q. Well, 093 was Pitcairn's plane, wasn't it?

A. Yes, that is correct.

Q. Yes. All right, now, what are the next two entries there? Could you tell us about those, please: "449"? [119]

A. Yes. There was evidently an aircraft that was going, or had filed a flight plan to Bakersfield; so we evidently didn't have his elapsed time, in other words, the elapsed time of his flight to Bakersfield. So I asked

(Testimony of Robert E. Buckles)

him—of course, again, the first part is blocked off here, chopped off. I can't tell whether it is Army or Navy. But I came back and said: "449, Los Angeles Tower. What will be your elapsed time to Bakersfield?"

Then he told me what it was, and I came back: "Roger. 50 minutes."

Q. What is the significance of that remark: "Roger. 50 minutes"?

A. "Roger, I received your transmission correctly, and it is 50 minutes." I was reaffirming what he said.

Q. It is true, is it not, that each flight must be plotted and filed with you before they take off

A. Well, it was true at that time more or less, yes.

Q. And you had to approve the flight plan, did you not, or the Civil Aeronautics Authority had to?

A. Yes.

Q. Before?

A. That is correct.

Q. That is, the entire flight taking off from the airport to the destination?

A. Yes, other than our test ships. [120]

Q. Yes. The test ships just flew in a restricted area near the airport, did they not?

A. Yes. I am not quite certain at this time. We had had various ways of getting them out. Sometimes we would call up in the morning and get a blanket clearance for the test area. But I am not quite certain how it went at the time.

Q. In other words, when a plane went up for a test, it had a definite flight pattern which it followed in that test?

A. No, I wouldn't say that, no.

(Testimony of Robert E. Buckles)

Q. Over a certain area?

A. It had a certain area to conduct its tests, yes.

Q. Yes. Now, then, the next: "Army 716. Roger. Wilco." Just what is that?

A. "Army 716, received your message correctly," that we would conform with whatever he asked for.

Q. Will what?

A. Well, now, if you look back here, this Army 716 was this aircraft that requested going to the transient parking area.

Q. Yes.

A. So he probably came through—now, I am just surmising because I don't remember; I am surmising that he asked us to close out his flight plan. So I said, "Roger. Received your message okay. Will close out your flight plan." [121]

Q. Oh, yes. All right, now, the next entry says:

"(To P-51)—093 cleared to the ramp."

Was that a communication from you to the plane which Mr. Pitcairn was flying?

A. That is correct.

Q. Where was that plane at that time?

A. We usually caught them as they were still on a straight course down the runway, rolling, and we would tell them, "cleared to the ramp."

Q. Do you recall a conversation with Mr. Pitcairn in the air with respect to what he was going to do and where he was going to go, or anything of that sort?

A. I don't, other than what I would surmise from the transcription here. The only thing I can see here is the landing instructions. We don't have the transcription before this; so, as I say, I can't remember what went on before that.

(Testimony of Robert E. Buckles)

Q. Is there one before this?

A. Well, this is the whole record, yes.

Q. I mean would the other one contain any further conversation with Pitcairn?

A. That is rather hard to say. It may and it may not.

Q. Could you check that readily this evening or before court tomorrow?

A. Well, the trouble is we are using all our re-
[122] corders all the time. It would be rather hard.

The Court: Is that very material, Mr. Brewer? It is after the planes got there that we are particularly interested in.

Mr. Brewer: Well, possibly so, your Honor.

The Court: Yes. I do not think that is material. After they got down is what we are interested in.

Q. By Mr. Brewer: What does this expression "cleared to the ramp" mean?

A. I was giving him permission to taxi to the ramp.

Q. Where was the ramp?

A. The ramp was what we classified—what we classified the ramp at that time was any parking area.

Q. Where was the parking area?

A. As I said before, Douglas had permission from the City to park their aircraft on the taxi-way "C," as it is known there, and also on the wide ramp there right in front of the control tower and hangars.

Q. This loading apron; is that what you mean?

A. Yes, that is a ramp.

Q. And this Runway C? A. Yes.

Q. And any others?

A. That is all the ramps we had at the time. I believe there were a few more parking areas around the field, [123] but that is all that is—(Pause)

(Testimony of Robert E. Buckles)

Q. When you said "cleared to the ramp," then, that meant this area here (indicating)?

A. Yes.

Q. Did it not?

A. Yes. In other words, that meant for him to follow the taxi patterns that we had laid out and go to the ramp.

Q. It did not meant to park on runway 22 then?

A. No.

Q. Now, you have on the next page there "(To SBD)." It is right about the middle of the page.

A. Uh-huh.

Q. Will you look at that, please? A. Yes.

Q. Does that indicate the first communication with that airplane, the SBD, Navy 302?

A. That is the first indication I have of any transmission to that aircraft, according to this record here, yes.

Q. All right. Will you read that and tell us just what it means, please?

A. Yes. Mr. Scott's call numbers were "Navy 302." "Navy 302 down-wind leg, cleared to land runway 25-R. I have an aircraft final for 25."

Q. Those are the words you spoke to Mr. Scott over the radio after connecting with him? [124]

A. Yes.

Q. Just what did that mean, sir? You said "down-wind leg, cleared to land runway 25-R." What does that mean?

A. Okay. That meant that he had called me on the down-wind leg, and I have previously explained where the down-wind leg was. And at that time it appears that I had traffic landing on 25, but I had no

(Testimony of Robert E. Buckles)

traffic landing on 25-R. So I cleared Mr. Scott to land on 25-R.

Q. In other words, your final remarks "I have an aircraft final for 25" means that you had some aircraft landing on 25 at that time and he was to go to 25-R?

A. Yes. It means that there is an aircraft on final approach for 25, or putting it in other words, there is an aircraft on final approach for the main runway.

Q. When you say "final approach" does that mean take-off or landing?

A. No, that is on landing. That is the leg after the base leg.

Q. Further down on that same page it says "(To SBD)—Navy 302. Cleared to the ramp. Hold north of the main runway."

Did you say that to Mr. Scott?

A. Yes, that is what it says.

Q. Then on the third page, will you look at that at the top of the page? It reads: "(To SBD)—Navy 302. Cleared [125] to cross main runway."

A. Uh-huh.

Q. Did you say that also to Mr. Scott?

A. Yes, that is correct.

Q. Do you recall what his replies were to those two statements? A. No. No, I don't.

Q. At any rate, where you say "cleared to cross main runway," that was this runway A, was it not?

A. Yes, that is correct.

Q. This is the total conversation, so far as the records show, from the tower to Mr. Scott as he approached in the landing pattern and landed at the field up to the time of the accident? A. Yes.

(Testimony of Robert E. Buckles)

Q. Were you aware of this P-51 being parked on runway 22?

A. To get back to this one transcription we passed over here "(To P-51)" on page 2—

Q. Yes, sir?

A "093. Los Angeles Tower over"

That was at the time Mr. Pitcairn called for a tractor, and I came back:

"093 Roger Wilco."

In other words, I received his message and would confirm to what he asked.

Q. Do you know how much time elapsed between that time and the time that you cleared Mr. Scott's plane to land on runway 25-R?

A. No, I couldn't say.

Q. All right. Well, at any rate, when you had this communication here with the P-51, Mr. Pitcairn, "093 Los Angeles Tower over. 093 Roger Wilco," was he on the field at that time?

A. Yes.

Q. He had landed?

A. That is correct. He was—

Q. And these Douglas planes were being tested at that time? You were familiar with that fact, were you not?

A. Yes.

Q. Quite a few of them?

A. Yes.

Q. Isn't it a fact that they usually came in when there was wind from the west like that (indicating), came in and came up the diagonal to the parking ramp?

A. We had some taxi patterns at that time that showed no aircraft were to taxi down that without permission from the tower.

(Testimony of Robert E. Buckles)

Q. When you stopped him at the main runway there, according to this record, you knew at that time that he was on [127] No. 22, the diagonal?

A. Yes. I could plainly see the aircraft, yes.

Q. You could plainly see it?

A. Yes, that's right.

Q. Yes. And you were aware also, were you not, that the P-51 had stopped there when you got this other call, "Los Angeles Tower over. 093 Roger Wilco," that you mentioned?

A. Yes, that is correct.

Q. That came, in point of time, before Mr. Scott was cleared to land on the runway, did it not?

Will you look at that second page there?

A. Yes, that is what it shows here, that the P-51 was already parked when Mr. Scott landed.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you.

You will not discuss this matter among yourselves or with anyone.

Do not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:35 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, May 14, 1947.) [128]

Los Angeles, California, May 14, 1947,

10:00 o'clock A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. 6074 Civil, United States vs. Douglas Aircraft Corporation, Inc., a corporation, for further jury trial.

Mr. Lillie: Ready for the Government.

Mr. Brewer: Ready for the defendants.

The Court: Let the record show the jury are present. Proceed, gentlemen.

ROBERT E. BUCKLES

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Brewer: May I have the last question and answer read, please?

(The record referred to was read by the reporter, as follows:

("Q. That came, in point of time, before Mr. Scott was cleared to land on the runway, did it not? Will you look at that second page there?

(A. Yes, that is what it shows here, that the P-51 was already parked when Mr. Scott landed.")

Direct Examination (Resumed)

Q. By Mr. Brewer: Were you aware then in the tower [130] that he had not, therefore, cleared on to the ramp as his prior instruction had been?

A. Yes, that's right.

(Testimony of Robert E. Buckles)

Q. You were aware of where he had parked; that it was on the runway?

A. On the edge, yes.

Q. When you cleared Mr. Scott to cross the main runway, you knew he was pursuing a course down the diagonal runway, the same one on which the P-51 was parked?

A. Yes, that is correct.

Q. Do you recall this accident, Mr. Buckles?

A. Yes, I recall it.

Q. Do you know or do you remember, rather, how long the P-51 was parked there before this accident occurred?

A. No, I don't remember that.

Q. What was the procedure you used in summoning a tractor to pull the airplanes in? Do you recall?

A. Well, that was more or less a supplement to our duty. Usually there is two or three of us working, and—

Q. That is, on the same shift there are two or three of you in the room there?

A. Yes, that's right. So we usually, if we had plenty of time, called them immediately on the telephone.

Q. Yes?

A. Or as soon as possible. [131]

Q. In other words, one of the three of you would call?

A. Yes, the one that wasn't busy.

Q. Do you recall whether that call had been placed or not on this occasion?

A. No, I don't recall.

Q. The Civil Aeronautics Authority is a branch of the Department of Commerce of the United States Government, is it not?

A. Yes.

(Testimony of Robert E. Buckles)

Q. And you receive your paychecks from the United States Government? A. Correct.

Mr. Brewer: You may cross examine.

Cross Examination

By Mr. Lillie:

Q. I wish you would clarify this for me a little, Mr. Buckles.

I wonder if you would be kind enough to take the Defendant's Exhibit C in evidence and turn to page 2.

A. (Examining document)

Q. Go to page 1. I believe it is page 1. The last direction you gave to the P-51 was, "cleared to the ramp," is that correct?

Mr. Brewer: It is on the second page.

The Witness: Those are the last directions, yes. [132]

Q. By Mr. Lillie: Now, on page 2 I see "(To P-51—093 Los Angeles Tower over. 093 Roger Wilco.)"

Is that the time he asked you for the tractor?

A. That was the time that he asked for the tractor, yes.

Q. The next communication with either of the planes was to the SBD, not counting the other planes that are interspersed in here in your directions to them. It says:

"Navy 302 down-wind leg, cleared to land runway 25-R. I have an aircraft final for 25."

Was that an instruction to the SBD?

A. Yes. That was an instruction to Mr. Scott to land on 25-R.

Q. Will you show us 25-R? Show the jury, rather, so that — (Pause)

(Testimony of Robert E. Buckles)

A. This runway here is 25-R. The "R" stands for "right." In other words, it's right of this one right here (indicating).

Q. The next statement on page 2 there is:

"Navy 302 cleared to ramp. Hold north of the main runway."

Is that your next instruction to Mr. Scott?

A. That was the next instruction.

Q. Would you turn around, please, and face the jury?

A. That was the next instruction to Mr. Scott. [133]

Q. Now, what did "hold north of the main runway" mean in your language of the CAA control tower work?

A. That meant for Mr. Scott to come to a stop before crossing the main runway, which is this runway here (indicating), come completely to a stop and hold for further instructions.

Q. All right. Will you take the stand, please?

Thereafter did Mr. Scott hold north of the main runway?

A. Mr. Scott held north of the main runway. However, he made a turn on the diagonal runway, or taxiway, as it was used for that purpose then.

Q. Do you have a traffic pattern there on the field also as well as in the air?

A. Yes. We have a taxi pattern for the field as well as the traffic pattern in the air. In other words, in the air if we tell an aircraft "clear to enter traffic pattern," he knows, according to the field rules, that he is to make a left traffic pattern, unless he has other instructions from us. And the same holds true with the taxi pattern on

(Testimony of Robert E. Buckles)

the field. Without any supplemental instructions, he shall follow the taxi pattern.

Q. What was the taxi pattern on the field with respect to Mr. Scott's landing position, if you know?

A. Yes. On 25-R the taxi pattern was to continue to the end of the runway, the very end, and then make a left [134]

Q. Did you point that out on the map just a minute ago? Did you point that out? A. No.

Q. Then will you show me on the map the traffic pattern?

A. The taxi pattern for 25-R is after the aircraft lands, to continue to the end and then turn down here (indicating).

Q. Now, is that what Mr. Scott did?

A. No. Mr. Scott —

The Court (Interposing): A little louder. The reporter, I think, is having difficulty in getting those questions and answers.

The Witness: Yes, sir. Mr. Scott made a left turn down runway 22.

Q. By Mr. Lillie: Instead of continuing down all the way to the end of that 25-R landing strip?

A. That is correct.

Q. All right, you may be seated, Mr. Buckles.

The next you heard from Mr. Scott, then, was when he was at the intersection of diagonal 22 and the main runway, is that correct? A. That is correct, yes.

Q. And that is your next entry, is it not? You cleared him across the main runway, as I think it is on page 3?

(Testimony of Robert E. Buckles)

A. Yes. That is the last communication I had with [135] that aircraft.

Q. How many aircraft did you have in the air at that time; do you know? Can you determine from your sheet?

A. Well, it would be rather hard to say. It varied. Sometimes we had as high as —

The Court (Interposing): No, no, just at that time.

The Witness: I don't remember at that particular time.

Q. By Mr. Lillie: Can you approximate how many?

A. I would approximate about six or seven, that is, in contact with me.

Q. Now, prior to this date had you during your period of work in control operation on this particular field had occasion to call for tows for other planes?

A. Yes, for a number of various reasons: for tests and disabled aircraft, and so forth.

Q. That is, where they were parked on a diagonal, is that correct? A. Yes.

Q. It was one of your duties to inform a taxiing plane that another plane was parked on a diagonal?

A. Well, there is no explicit duties prescribed for that. The traffic control division is just merely set up for traffic control.

Mr. Brewer: I am sorry, but I didn't hear that answer.

(Answer read by the reporter.) [136]

Q. By Mr. Lillie: Well, had you on previous occasions, and was it customary to, given them advance

(Testimony of Robert E. Buckles)

notice that a plane or an obstruction was on the runway when they were taxiing?

A. It wasn't necessarily customary. It was, well, it was in our — with respect to our division as to whether — well, let's see. How would I put this.

Q. Take your time and just tell in your own words what your duties were and what you did on those occasions.

A. Well, of course, we in traffic control, our main object was to attempt to prevent accidents. However, if in our minds, why, there wasn't any necessity for informing aircraft of any obstructions, and so forth, then we wouldn't do it. Of course, our air traffic came first.

Q. That is, your traffic in the air?

A. Our traffic in the air came first.

Q. Well, then, would you say it depended upon the circumstances of how much traffic was in the air with relation to what was proceeding on the ground?

A. Yes, that is correct. It would depend on that.

Q. To go one step further, if you had two calls to put out, one to a man in the air and one on the ground, would you have a preference?

A. Let's put it this way: If a man called for landing instructions and a man called for taxiing instructions, we [137] would give the man in the air first preference, yes.

Q. Where you were in the control tower, how far away was the scene of the accident, approximately?

A. That would be approximately one-half mile. It wouldn't be quite that; approximately three-eighths of a mile, I would say.

(Testimony of Robert E. Buckles)

Q. How soon after the accident did you have notice of it?

A. I didn't see the actual impact. It was just as the SBD was swung around.

Q. Could you see both planes? A. Yes.

Q. From three-eighths of a mile away?

A. Yes.

Q. Were they clearly visible?

A. Well, they were clearly visible. We couldn't see minute parts of the airplanes.

Q. But the plane itself was clearly visible?

A. Yes.

Mr. Lillie: That is all.

The Court: That is all, thank you.

Mr. Brewer: Just one question, your Honor.

The Court: I hope counsel will get this record and keep it straight. We have been back and forth three times. Proceed. [138]

Redirect Examination

By Mr. Brewer:

Q. Well, now, with reference to this taxi pattern, the P-51 should have been proceeding down the main runway to the end, also, should it not?

A. No. Each individual runway had a separate traffic—correction—taxi pattern; and for 25 main runway there was two separate exits. One was on diagonal 22 and also one on the end which you can plainly see. There was no need for limiting turns off the main runway because they were not going to taxi into any landing path.

(Testimony of Robert E. Buckles)

Q. Now, the traffic never moved on the ground there without permission and instructions from the tower, did it?

A. You can put it usually that they didn't.

Q. Sir? A. Usually not.

Q. However, the Douglas planes had been using that diagonal to cross the field, hadn't they?

The Court: That has been asked and answered.

Though it has been asked and answered, counsel, I shall permit him to answer again.

Mr. Brewer: All right. I don't recall.

The Witness: Yes. In that case we would say, "Navy such-and-such cleared to the ramp via the diagonal taxiway."

Q. By Mr. Brewer: These taxiing rules were subject to [139] variation by the tower, weren't they?

A. Yes, that is correct.

Q. And when you cleared Mr. Scott across the main runway you knew, of course, that he was using that variation and going down the diagonal ramp?

A. Yes. At that time I couldn't very well make him turn back and go into the traffic again.

Q. He could turn up the main runway at the end, couldn't he?

A. No. There was aircraft landing there. It was much quicker to get him across than it was to continue to the end.

Q. Now, in this traffic in the taxiing rules of the airport there was a rule against parking on the runways, too, was there not?

A. There was nothing in the field regulations, no.

(Testimony of Robert E. Buckles)

Q. There was nothing in the field regulations. That was controlled by the tower? A. Yes.

Q. North American had had these tows before of planes while testing?

A. Yes, at various times, yes.

Q. While testing this air pressure? A. Yes.

Q. You were aware of those tests going on, I suppose?

A. We were aware when they called up, yes. [140]

Mr. Brewer: That is all.

The Court: That is all, I hope.

(Witness excused.)

Mr. Lillie: I think this is Mr. Brewer's witness, your Honor, but I believe he may be excused.

The Court: Any further questions?

Mr. Brewer: No, your Honor.

The Court: All right, you may be excused.

Mr. Lillie: Thank you, your Honor.

Mr. Brewer: Mr. Christiansen.

ROBERT EDWARD CHRISTIANSEN

called as a witness by and in behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert Edward Christiansen.

The Clerk: How do you spell your last name?

The Witness: C-h-r-i-s-t-i-a-n-s-e-n.

The Clerk: Robert Edward Christiansen, C-h-r-i-s-t-i-a-n-s-e-n.

(Testimony of Robert Edward Christiansen)

Direct Examination

By Mr. Brewer:

Q. Where do you live, Mr. Christiansen?

A. 714 Cedar, Hawthorne.

Q. Speak just a little louder for us, will you, please?

A. 714 Cedar, Hawthorne, California. [141]

Q. By whom are you employed, Mr. Christiansen?

A. Douglas Aircraft.

Q. How long have you been employed by them?

A. Oh, since December 1939.

The Court: Are you still employed there?

The Witness: Yes.

The Court: All right.

Q. By Mr. Brewer: Now, were you present on the air field, Mines Field, when this accident happened Armistice Day 1943?

A. Yes, I was.

Q. Where were you located on the field at the time of the accident?

A. Well, we were approximately, oh, a hundred yards from the accident.

Q. What were you doing there?

A. Well, we were waiting for Mr. Scott to land.

Q. After he landed what was your plan? Were you going to work on the plane, or something like that?

A. Well, he was up for a check flight; and if the plane was all right, he would continue on into the hangar. And if it wasn't all right, why, we would park him right there at the end of the runway, rather on the ramp, where we were allowed to park our ships.

Q. Yes, sir? [142]

A. And continuing working on it and preparing it for another flight.

(Testimony of Robert Edward Christiansen)

Q. The ramp you speak of is the one in front of the administration building and these hangars?

A. No, out on the C line.

Q. Runway C? A. Yes.

Q. Were there other planes parked there similar to the SBD Mr. Scott was flying? A. Yes.

Q. Did you notice this Mustang P-51, when it landed and pulled up there?

A. Well, I didn't notice just when it landed; but I saw it after it had been stopped.

Q. You saw it after it was stopped. Did you continue to keep it more or less under your observation until the time of the accident?

A. Well, yes. When a ship stops like that on a taxi strip or on a runway, why, it just comes natural to kind of watch it and wonder what's wrong with it.

Q. Did you notice whether or not the engine was stopped? A. Yes, it was.

Q. What particular direction was it facing?

A. Well, he was facing in a southwesterly direction.

Q. Was it parallel with the runway 22, or S as it used [143] to be called?

A. Yes, it was. That is the diagonal.

Q. The diagonal? A. Yes.

Q. Now, this has been marked the approximate place where it was, this red mark here (indicating).

Does that meet with your approval and knowledge of it? A. Yes, that is pretty close, yes.

Q. Was it on the runway or off the runway?

A. It was on the runway.

Q. Did you observe the pilot in the Mustang?

A. Yes.

(Testimony of Robert Edward Christiansen)

Q. What did you see him do, if anything?

A. Well, it looked like he was talking over his radio. He had his hand up to his mouth as if he was using the microphone.

Q. All right. Now, how long did that Mustang stay there before the accident happened?

A. Oh, five, 10 minutes.

Q. Then did you see the accident itself, Mr. Christiansen? A. Yes.

Q. Did you see the SBD cross the main runway?

A. Yes.

Q. Will you describe its movements from the time it [144] started across the main runway right up until the time of the accident?

A. Well, I saw Mr. Scott when he stopped at that intersection at the main runway, and then he proceeded on across. When he got pretty close to the Mustang, I knew he hadn't seen it.

The Court: No, strike that out.

Q. By Mr. Brewer: Well, did Mr. Scott's plane go straight across the main runway? A. Yes.

Q. Did you notice it doing any S-ing at any time?

The Court: Now, counsel, please. This is your witness. These are all leading questions, but I have permitted them. Just ask him what he saw. Let him testify.

Q. By Mr. Brewer: Describe the progress of the plane up to the point of the accident.

The Court: That is right.

The Witness: Well, he didn't "S" across the main runway. I don't believe he S-ed it across the main runway, but I can't remember how many S-es or if he started

(Testimony of Robert Edward Christiansen)

any S-es after he started on the main runway. That is very vague in my memory.

Q. By Mr. Brewer: Did you go over to the scene of the accident? A. Yes.

Q. When you got there did you notice where the two [145] pilots were?

A. Well, the pilot in the Mustang was out of the aircraft wing and Tom was just crawling out, I believe.

The Court: You mean Mr. Scott?

The Witness: Mr. Scott. Pardon me.

Mr. Brewer: You may cross examine.

Cross Examination

By Mr. Lillie:

Q. I have only one question to ask you, Mr. Christiansen. That is, you stated that you were about a hundred yards away from the place where the accident occurred?

A. Yes.

Q. Would you come down and show me on the map approximately where you were?

A. Approximately in here (indicating).

Q. I see. I will just mark this "P-3" for the record.

You had watched the Army plane stop on the diagonal at the point indicated as "P-2"—pardon me—it is initialed an "X" by the initials "S.W.V." so that the spot is indicated as right here (indicating), is that correct? A. That is right.

Q. You had no difficulty in seeing the plane, did you?

A. No, I didn't.

Mr. Lillie: That is all.

Mr. Brewer: That is all. (Witness excused.) [146]

Mr. Brewer: Mr. Tybie.

ROBERT ANDREW TYBIE

called as a witness by and in behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert Andrew Tybie.

The Clerk: How do you spell your last name?

The Witness: T-y-b-i-e.

The Clerk: Robert Andrew Tybie, T-y-b-i-e.

Direct Examination

By Mr. Brewer:

Q. Where do you live, Mr. Tybie?

A. 8333 Grape Street, Los Angeles 1.

Q. By whom are you employed?

A. Douglas Aircraft.

Q. Were you so employed on November 11, 1943?

A. Yes.

Q. What was your job there at that time?

A. I was a field service mechanic.

Q. Were you employed out at the field, Mines Field, Los Angeles Municipal Airport? A. Yes.

Q. Do you know Mr. Scott here, the pilot of the SBD plane? A. Yes, I do. [147]

Q. What kind of work were you doing out there, sir?

A. I was working out on the flight line out on runway C. We spent all our time out on the line.

Q. Did you see this accident that we have been speaking about here in this trial? A. Yes, I did.

Q. Where were you located at the time and what were you doing?

A. I was located on the C line on the ramp, as they call it there, down right —

(Testimony of Robert Andrew Tybie)

The Court (Interposing): Go and indicate on the map for the jury.

The Witness (Continuing): — standing approximately right almost to the end of this right here, I would say 25 yards from the end of the runway there. (Indicating).

Q. By Mr. Brewer: You just mark it with a pencil, please. A. (Marking diagram)

Q. Right next to this "P-3" we will mark that "T-1" for the record.

What were you doing there, Mr. Tybie?

A. We was waiting for Mr. Scott to come in, and if he gave us an okay that the plane had been accepted, it was all right, we would direct him down this runway C and then he would come in to our hangar if it was okay. [148]

Q. You may resume the stand there, please.

Now, had you, before he landed noticed the Mustang, the P-51, out there on the field some place?

A. Yes. It was sitting there before he landed.

Q. Do you notice here a red mark which has been identified as "S.W.V." right here? (Indicating)

A. Yes.

Q. Is that approximately the place where the Mustang was parked or located? A. Yes.

Q. How long was that Mustang there before the accident?

A. Well, he had been there approximately 10 minutes.

Q. Did you notice whether or not the engine was dead, that is not running?

A. No, the engine was not running.

(Testimony of Robert Andrew Tybie)

Q. Did you notice anything the pilot did while you were watching him?

A. Well, yes. He evidently was calling someone on his radio because we could see him holding his mike to his lips.

Q. How far away was that Mustang from you, approximately?

A. Well, he was approximately a hundred yards.

Q. Did you observe the movements of Mr. Scott there on the field that day? A. Yes, I did. [149]

Q. After he landed? Will you just describe them to the court and jury, please?

A. Well, Mr. Scott landed on runway — let's see — 25-R, I believe; and he turned left on the diagonal and stopped at the main runway. He sat there a minute, probably; then he taxied across the main runway in a straight line across the main runway. After he had crossed the main runway, he started his S-ing immediately after he had crossed the main runway. And then he hit the Mustang that was parked on the runway.

Q. Could you tell from where you were approximately how far in on the main runway the Mustang was parked?

Well, withdraw that. You went over there afterwards, did you? A. Yes.

Q. Could you tell about what the position of the Mustang was there after the accident?

A. Well, the Mustang was — the whole plane was on the runway. The wing itself was on the asphalt. I would say the right main gear was approximately 20 feet from the edge of the runway.

Q. What do you mean by the "right main gear"?

A. The right main landing wheel.

(Testimony of Robert Andrew Tybie)

Q. The right landing wheel?

A. Yes. [150]

Q. Now, when the plane had crossed the main runway, do you recall how many S-es were made by the plane before the collision?

Mr. Lillie: That is objected to, your Honor, on the ground that it is leading.

The Court: Well, it is not quite leading. Of course, the better form of the direct question to one's own witness is, "Just describe what you saw with reference to the movements of the plane."

Then that avoids any question at all of its being leading.

Mr. Brewer: He has already mentioned the S-ing, your Honor.

The Court: All right. Just describe what you saw.

The Witness: Well, I couldn't say exactly how many S-es he did make.

Q. By Mr. Brewer: You went over to the planes, you said. Did you see the pilots there at the planes after the accident? A. Yes.

Q. Where were they?

A. Well, I don't recall exactly where they were when we first got there. I don't recall just exactly where they were.

Mr. Brewer: You may cross-examine. [151]

Cross Examination

By Mr. Lillie:

Q. Mr. Tybie, did you observe the plane that Mr. Scott was piloting when it first landed on 25-R?

A. Yes, I did.

(Testimony of Robert Andrew Tybie)

Q. Is that approximately "P-1" as marked on this map? A. Yes, that is pretty close.

Q. Then did you also observe him taxi down to P-2? Would you like to come down here and look at the map? It might help.

A. He taxied along here down to this — is this the main runway?

The Court: Yes.

Mr. Lillie: Yes.

The Witness: Down to the main runway and stopped.

Q. By Mr. Lillie: Did you observe him stop at P-2?

A. No.

Q. If you did, if he had stopped, would you remember it in view of the length of time?

A. Yes, I would.

Q. When he taxied from P-2, as indicated on the map, to the intersection of the diagonal 22 for the main runway, where it is marked "X," did he stop there?

A. Yes, he stopped at the edge of the main runway.

Q. What did he do, if anything, while he was stopped [152] there?

A. Well, I would say he just set there.

Q. Did you notice him turn to the east to watch a ship take off? A. No, I didn't.

Q. When he taxied from point "2" to the intersection of the diagonal and the main runway, did you observe whether or not in taxiing he made S turns?

A. Yes, he did.

Q. He made S turns all the way down?

A. Yes.

(Testimony of Robert Andrew Tybie)

Q. From point "P-2" to the intersection of the diagonal and the main runway? A. Yes.

Q. How long did he wait at the main runway?

A. I would say approximately a minute.

The Court: A little louder, witness.

The Witness: About a minute.

The Court: Your back is turned to the reporter.

Q. By Mr. Lillie: Now at this point, if you can—did you observe him cross that main runway?

A. Yes.

Mr. Lillie: May we have a red pencil? May I borrow it?

The Clerk: Yes.

Q. By Mr. Lillie: Would you be kind enough to draw [153] approximately—keeping in mind that this runway "F" is 150 feet wide—the position in relation to the width of runway "F" that he came out of this intersection here, which is the other side of the main runway?

A. Well— (Pause.)

Q. Do you understand my request? A. Yes.

Q. From this point, just draw a line from the one point to the other.

A. (Marking diagram.) He come straight across there just a little to the right of the center line.

Q. To the right. Now, by "to the right" you mean in this direction (indicating), is that correct?

A. Yes.

Q. Then he started his S turns, is that correct?

A. Yes.

(Testimony of Robert Andrew Tybie)

Q. Thank you. You testified you saw the Army plane parked on the diagonal when it came to rest with its motor stopped. The pilot appeared to be using a microphone or holding something up to his mouth, is that correct? A. Yes.

Q. You had no difficulty in making out and seeing the plane from a distance of a hundred yards, did you?

A. No.

Mr. Lillie: Thank you. That is all. [154]

Mr. Brewer: That is all.

The Court: That is all, thank you.

(Witness excused.)

Mr. Brewer: Mr. Bergren.

MORTIMER MILTON BERGREN

called as a witness by and behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Mortimer Milton Bergren.

The Clerk: How do you spell your last name?

The Witness: B-e-r-g-r-e-n

The Clerk: Mortimer Milton Bergren, B-e-r-g-r-e-n.

Direct Examination

By Mr. Brewer:

Q. Where do you live, Mr. Bergren?

A. 6215½ Heliotrope in Bell, California.

Q. By whom are you employed, sir?

A. The El Segundo Division of Douglas Aircraft.

(Testimony of Mortimer Milton Bergren)

Q. How long have you been employed by them?

A. Since September in 1942.

Q. What is your occupation with them there?

A. At the time of the accident I was assigned to instrumentation.

Q. In connection with your work were you present on the field, Mines field, Los Angeles Municipal Airport, when this [155] accident happened?

A. I was.

Q. What part of the field were you in, Mr. Bergren?

A. I was standing on what was called the front porch of the Douglas hangar.

Q. Will you step down to the diagram and indicate that with this red pencil?

This is the administration building marked in red and these three hangars (indicating).

A. Well, there is a portico or porch that runs along the front of this hangar. I would be in this approximate position, I would say (indicating).

Q. All right, thank you. I will mark that, if I may, "B-1."

Did you see the Mustang, the P-51, land and park in the vicinity there? A. Yes, I did.

Q. Was it at this point which has been testified to here (indicating)? Does that meet with your remembrance of it, the "X" I am pointing to?

A. Well, that would be a little hard to say for me. I was at a considerable distance from the airplane, and the relative position of the airplane on that ramp, I was

(Testimony of Mortimer Milton Bergren)

too close or too close to the ground to be able to identify exactly its position. [156]

Q. Did you go over there after the accident?

A. No, I did not.

Q. I see. All right. Now, did you see the Mustang come up there and stop? A. Yes, I did.

Q. You saw it stop there. How long was it there before the accident happened?

A. Well, I would estimate somewhere in the neighborhood of 10 minutes.

Q. Did you see Mr. Scott land?

A. Yes, I did.

Q. Did you observe his course, the course of his plane, from the place where he landed up to the collision?

A. I saw him land on 25-R and coast or taxi to the main runway where he stopped and then pause there and then continue on across the runway and then very shortly thereafter collide with the P-51.

Q. Now, will you tell us, did you observe the movements of the plane? Could you observe them where you were from the time he landed up until the time of the accident?

A. I don't remember whether I saw him fishtail or S turn. We got so used to seeing those planes make that maneuver on the ground that I probably just figured that he did anyway.

Q. You don't distinctly recall?

A. I don't remember whether he did. [157]

Mr. Brewer: You may cross examine.

(Testimony of Mortimer Milton Bergren)

Cross Examination

By Mr. Lillie:

Q. At the point from which you were standing, Mr. Bergren, you had no difficulty identifying the P-51 on the diagonal, did you?

A. No, I don't believe I did. We are so used to watching those planes over there that we spot them quite readily.

Q. You identified it as a P-51, didn't you?

A. When I watched him land, yes.

Q. Now, I might state that in respect to this "X" marked on the map, which is the position of the P-51, the Army plane, parked on the diagonal, it has been estimated by practically all the witnesses about a hundred feet from the southerly edge of the main runway.

There have also been some estimates made by two of the witnesses who have just testified prior to you that they were approximately 100 yards away from the place where the P-51 was parked. That is indicated on this map by two "X's" designated as "T-1" and "P-3."

Further, the control tower operator testified that he was approximately three-eighths of a mile from the point where the Army plane was parked.

Now, with that in mind, can you give me an idea of the distance, if those are correct distances in your mind in [158] relation to this map, how far away you were from the P-51 at the time it parked?

A. The control tower and the Douglas hangar are separated by a very short distance, and the Douglas han-

(Testimony of Mortimer Milton Bergren)

gar is a little further away from the P-51; but I don't have an idea how far.

My judge of distance wouldn't be that accurate.

Q. But in any event it is a little further away than the control tower itself? A. That's right.

Mr. Lillie: That is all. Thank you, Mr. Bergren.

Mr. Brewer: That is all.

(Witness excused.)

Mr. Brewer: Call Mr. Scott.

THOMAS W. SCOTT

called as a witness by and in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

The Clerk: Mr. Scott has been sworn.

The Court: He has been sworn previously.

By Mr. Brewer:

Q. Now, Mr. Scott, you have testified before here that you landed on that field many times before this accident.

In talking to the tower there, did the tower distinguish [159] in any way between instructions to continue on down the runways toward the north end of the field, or the west end of the field, or using the diagonals?

The Court: Repeat that question of counsel. Counsel is long-experienced and knows it is not in proper form.

Read the question.

(Testimony of Thomas W. Scott)

(Question read by the reporter.)

The Court: What instructions did you get from the tower at that time?

The Witness: Just that one day? To hold north of the runway.

The Court: Repeat that, Mr. Reporter.

(Answer read by the reporter.)

Q. By Mr. Brewer: I am not referring to that day, Mr. Scott. I am referring to prior occasions when you talked to the tower and they were directing you in the traffic pattern there.

A. Sometimes we would land on that runway. If there was a ship close behind us, they would tell us to continue down to the edge of the field and expedite our taxi. And other times they would tell us we could use the diagonal if we wanted to. And other times it was, as they said that day, to hold north of the runway.

Q. What did you understand that to mean, "hold north of the runway?" [160]

When this command was given to you, which has been read here, "(To SBD—Navy 302 cleared to the ramp. Hold north to the main runway.)"

What did you understand that to mean?

A. Just to be sure and not cross the runway until I received permission to.

Mr. Brewer: That is all:

Mr. Lillie: No questions, your Honor.

The Court: All right, that is all, thank you.

(Witness excused.)

Mr. Brewer: We rest, your Honor.

The Court: All right. Any rebuttal from the government?

Mr. Lillie: Pardon me, your Honor.

The Court: Any rebuttal?

Mr. Lillie: No rebuttal, your Honor.

The Court: We will take a short recess for the jury.

Ladies and gentlemen of the jury, we will take a short recess. You will remember the admonition I have heretofore given you not to discuss the matter among yourselves or permit anyone to discuss it in your presence. Do not form or express any opinion as to the merits of the controversy until it is finally submitted to you under the instructions of the court.

We will take a short recess for the present. You may be [161]

(Jury excused for recess.)

The Court: I have gone over the instructions, gentlemen.

Mr. Lillie: Before we start on those, may I direct the court's attention to the fact that the government at this time would like to make a motion.

The Court: All right.

Mr. Lillie: Does the court desire to take a recess first—

The Court: Let us go ahead.

Mr. Lillie: —and then argue the motion? All right.

If the court please, the government at this time will make a motion for a directed verdict.

The grounds and authorities for the motion are set out with particularity in our points and authorities submitted in support thereof.

In this case I should like to call the court's attention to the fact that there is no conflict in the facts that were presented to the court and the jury, in either the facts adduced by the evidence, by the government, or those set out and adduced by the evidence of the defendant Douglas Aircraft Corporation and the defendant Thomas W. Scott.

Ordinarily in a question of negligence it is one of fact to be determined by the jury. However, it is held (and I cite the cases) that where the undisputed evidence (and there is no dispute in the evidence here, except the actual act of [162] negligence) is of this character so conclusive that the court should, in the exercise of its discretion, set aside a verdict not in accord therewith. The question is one of law which warrants the court in directing a verdict.

Now, in that respect, if we narrow the facts down to their simplest form, we find that we have here a plane parked on a runway. There is approximately 100 or 120 to 125 feet of leeway or passage to one side of it;

That the operator, the defendant Scott, piloting the Douglas airplane, testified without any equivocation that he looked and did not see the plane;

That he was performing what he was required to perform, an "S" turn in an effort to see what was before him.

Now, I don't think there is any question with respect to the law in the court's mind that where one looks but

does not see what is in plain sight, he cannot be heard to say that he did not see. If he does, it is negligence.

The defendant in this action has attempted to set up negligence on the plaintiff or its agents and servants.

For the sake of argument we will admit that there was negligence; that there was negligence on the part of the control tower in not informing Mr. Scott, the defendant, that as he proceeded down that diagonal that there was parked there the plane of the plaintiff, the P-51.

We will go one step further and for the sake of argument [163] admit that the plane was illegally there; that it should not have been parked there.

The next question is a matter of law: What was the proximate cause of the accident?

Well, in the instant case we have the P-51 in a collision. It is not contributory negligence in itself because it was not the operating factor. The efficient cause of the accident was the failure of the pilot, Scott, after looking and not seeing the plane, which was in plain sight, continuing on and colliding with the aircraft of the plaintiff.

That was the only cause of the accident and the proximate cause of the accident.

On that ground, if the court please, I believe that the government is entitled to a directed verdict.

The Court: Motion denied, exception allowed.

Gentlemen, I have looked over the instructions.

Mr. Brewer: Is this the time to render any objections, your Honor, to the instructions?

The Court: Yes. I shall give you that opportunity when I come to them.

Mr. Brewer: Oh, yes. There was one of the government's to which I objected.

The Court: Yes. I shall take the defendant's instructions.

Mr. Brewer: I have them numbered at the bottom, your [164] Honor.

The Court: Yes. From No. 1 to No. 17 of the defendant's instructions are instructions that I always give.

I shall hear from the government, if they have any objection to Nos. 1 to 17.

Mr. Lillie: No objections, your Honor.

The Court: No, they are proper. Nos. 18 and 19; I do not find any objection to them. They are in a little different form, but I find no objection to 18 and 19 of the defendants.

I find no objection to 20 to 29 of the defendants.

Mr. Lillie: 20 and what was that, your Honor?

The Court: From 18 to 29, I find no objection.

Mr. Lillie: Is the court ready to hear my objection?

The Court: Yes.

Mr. Lillie: All right. On No. 18 the government will object on the ground that under the facts adduced, as a matter of law contributory negligence is not shown. That is as to No. 18.

The Court: Yes. That preserves your motion and your—

Mr. Lillie (Interposing): Yes, that is my objection on that ground.

The Court (Continuing): —and your statement, that is right. It will be given and exception allowed.

Mr. Lillie: The same objection to No. 19 on the same [165] ground.

The Court: Yes. No. 19 will be given and exception allowed.

Mr. Lillie: No objection to No. 20.

further ground that contributory negligence is not a complete statement of "contributory negligence" in the first line.

By that I mean, "contributory negligence is negligence upon the part of the party claiming damages or its agents . . ."

Now, that sentence is certainly incomplete. It is not a full statement of contributory negligence.

And the last sentence of the second paragraph:

"The reason for this rule of law is not that the fault of one party justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents . . ."

The causation is certainly argumentative. In substance, [168] if it were written out complete, as it should be, it would be a duplication of instructions 27 and 28.

Mr. Brewer: I might say, your Honor, that that is just a definition of "contributory negligence" as taken out of the cases, as taken out of the book with jury instructions and adapted to this case.

The Court: Yes: I think, counsel, if there is negligence on the part of the government in this case, that is one statement. I see no objection to a definition of "contributory negligence."

Mr. Lillie: Well, certainly that last sentence is argumentative, your Honor, in that paragraph. We have had previous to this in instruction 27 the same substance given, so that it is merely a duplication.

The Court: It has a repetition in No. 25 of the defendants.

Mr. Lillie: That is correct

The Court: If you will look at 25.

Mr. Lillie: In substance it is, your Honor.

The Court: Yes.

Mr. Lillie: It is a duplication.

The Court: Yes. Mr. Brewer, I think we have that pretty well covered in the other instructions, in 25 and 27.

I shall give the first sentence in defendants' No. 29. It is the opinion of the court that the sentence starting at [169] line 5, "Any person . . ." to the end at line 10 is duplication of other defendants' instructions.

Mr. Lillie: You are adding that onto which number?

The Court: I am not adding it onto anything. I am just striking it out, and I am giving the first sentence from lines 1 to 4.

Mr. Lillie: Is that a true statement of the law, your Honor, from lines 1 to 4?

The Court: It is, with the other statements in the instructions.

Mr. Lillie: As a matter of law, can we say, "contributory negligence is negligence upon the part of the party claiming damages or its agents"?

Mr. Brewer: It would have to be, it seems to me. That is a general statement of contributory negligence in personal injury. Of course, in this case it is different. It is damages.

The Court: Is that not correct, Mr. Lillie?

Mr. Lillie: Suppose the party did not act nor made no omission—

Mr. Brewer (Interposing): Well, this is just a definition for the jury of the term.

Mr. Lillie (Continuing): —is it contributory negligence?

The Court: It might be contributory negligence if the [170] jury believed that this plane was in an improper place for 10 minutes and that it was impossible for the other person to see it.

I do not know what conclusion they will come to.

Mr. Lillie: Yes, that is true, your Honor. But here is a statement of law.

The Court: Yes.

Mr. Lillie: "Contributory negligence is negligence upon the part of the party claiming damages or its agents which, cooperating in some degree with the negligence of another, helps in proximately causing the damage of which the former thereafter complains."

Mr. Brewer: I think that definition is given in many cases of contributory negligence. It is used in this book of approved jury instructions.

Mr. Lillie: There is one point I haven't brought out as yet: that in order for that to be correct, I think the court will either have to add that "contributory negligence is negligence upon the part of the party claiming damages or its agents, acting within the scope of their authority . . . "

The Court: There is no objection to that. It would have to be that.

Mr. Lillie: Because it would certainly be incomplete without it.

Mr. Brewer: There would be no objection to that. [171]

The Court: Now, wait a minute.

Now, go on Mr. Lillie:

Mr. Lillie: And then, " . . . in the furtherance of the master's business."

The Court: That would be acting within the scope—

Mr. Lillie (Interposing): I think it would be.

The Court (Continuing): —of his authority; then that would imply it was on his master's business.

Mr. Lillie: As to the second paragraph, your Honor—

The Court: No, that is out.

Mr. Lillie: Very well, your Honor.

The Court: Given as modified.

I notice, Mr. Brewer, this does not provide for any modification of the instructions. It says "Given" and "Refused."

Mr. Lillie: That's right. As I understood, your Honor, they no longer use that form. Is that correct?

The Court: "Modified"?

Mr. Lillie: No, as to putting down "Accepted," "Given," and "Modified."

The Court: Oh, yes.

Mr. Lillie: I understand some of the judges don't want that.

The Court: Right here now, for instance, an instruction we have modified: That always ought to be on there.

Oh, yes, gentlemen. I want to say, Mr. Brewer, I wish [172] other attorneys would prepare instructions as you have, instead of, as I usually get here, a hundred instructions, repeating and repeating different language, different cases. It is a great annoyance to the court. These principles are very simple.

Mr. Brewer: Yes, your Honor, they are.

The Court: They ought to be stated simply.

In a case I just concluded in New York they gave me 222 instructions on which to spend a few nights.

Mr. Brewer: 222? That is a record, isn't it?

The Court: 222 instruction! That is terrible, you know. But the court has to carefully consider, not only every instruction but every word in every instruction.

Now let us go to defendants' No. 28, gentlemen. Following that I have suggested this instruction:

"The defendant, Douglas Aircraft Company, Inc., is a corporation and as such can only act through its officers and employees who are its agents. The acts or omissions of an agent, done within the scope of his authority are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is."

Mr. Brewer: That is satisfactory.

The Court: Yes. That is a counterpart to your instruction and includes within it the suggestion Mr. Lillie made there: "... done within the scope of his authority . . . " [173]

Mr. Lillie: That is on—

The Court (Interposing): That would follow 28.

Mr. Lillie: Well, 28 I thought was denied, your Honor.

The Court: No.

Mr. Lillie: As being a duplication of 27.

Mr. Brewer: Yes, I think it was.

The Court: 27, I mean. Yes, you are right.

Mr. Lillie: That follows 27?

The Court: 27. You are right. I turned the wrong page.

The government's No. 1, I believe, is the same as the defendants' 13, is it not?

Mr. Lillie: That is correct, your Honor.

Mr. Brewer: Yes.

The Court: So I will give the defendants' No. 13.

The government's No. 2, I think, is the same as the defendants' 14.

Mr. Lillie: That is correct, your Honor.

The Court: I shall give the defendants' No. 14.

No. 3 on ordinary care is the same as the defendants' No. 16.

Mr. Lillie: Both must be the same jury instructions, your Honor, yes.

The Court: And No. 4, if you will please examine the one proposed by the government, is the same as defendants' 17. [174]

Mr. Brewer: Yes, I believe they are the same.

The Court: Would you check that, Mr. Lillie? I think it is the same.

Mr. Lillie: Yes, it is, your Honor.

The Court: Now, No. 5: I have a question mark after it.

Mr. Brewer: That is the one I wanted to object to because it did not include contributory negligence, your Honor.

The Court: Well, the objection I have to it is not that particularly but because we have not done it in the other instructions.

Here you specifically ask the court to instruct the jury as to the acts of one of the pilots in this case.

It appears to the court it is argumentative because the argument to the jury is going to be what this man did. Now you are asking the court, after specifically stating these different rules of negligence and ordinary care, and so forth, to tell the jury to pick out one of the pilots.

That is argumentative, gentlemen. I am going to deny it.

Mr. Brewer: I think No. 6 takes care of what he is trying to say anyway.

The Court: Yes, No. 6 is all right and I am going to give it. That was my next point here. 6 is all right, and 7 is all right.

Mr. Brewer: Yes, your Honor. I have no objection, except as to 5. [175]

Mr. Lillie: It didn't take long to settle those.

The Court: I want to say, gentlemen, that in all the time I have been on the bench I have never had as satisfactory instructions as have been handed to me here. It is a delight, as to both sides, to read these instructions.

I shall have to give these instructions now to the jury, gentlemen, and they will have to lunch and the government and the defendants will both have to divide the lunch fees.

How are you fixed, government?

Mr. Lillie: Oh, oh! I am "unfixed."

You know, we may not get any salaries for a while, Judge. You are cognizant of that fact, I know.

The Court: In a criminal case, of course, the government takes care of it. In all civil cases, where you have a jury, the expenses are divided.

I do not think you will have any difficulty in getting your half of it if the court makes an order.

Mr. Lillie: Well, I have no idea, your Honor. This is the first time I have run into it. Of course, you know also that they have no account. You cannot draw any money for expenses. We haven't been able to for about

30 or 40 days. I don't know whether the court has any difficulty, but you can't in our office.

Mr. Brewer: To save counsel embarrassment, your Honor, I [176] shall pay for the jury's lunch.

The Court: Of course, the jury will not know.

I will put it this way: Mr Brewer has been very fine about it and wants to get this case out of the way. Mr. Brewer will pay for it.

You make an application, Mr. Lillie, and state the position of the court: that the government should pay half of it and then remit it, if you can, to Mr. Brewer.

Mr. Brewer: That is very satisfactory.

The Court: We know how strict the rules of the government are. Of course, if the money is not there, if the appropriation is not there, even as a judge I cannot get it.

Mr. Lillie: May I have one minute, your Honor?

The Court: All right, we will take five minutes.

(Brief recess.)

Mr. Brewer: Do you want the time for argument, your Honor?

The Court: That is the next point, gentlemen.

Mr. Lillie: I think it will take me about 10 minutes to open and about 20 minutes to close.

The Court: Is a half-hour satisfactory to you?

Mr. Brewer: That is satisfactory.

The Court: All right, half an hour on both sides. That will be perfectly satisfactory, gentlemen, and it is going to relieve you of your payment for the jury's lunch because I [177] won't instruct them until after lunch.

Mr. Lillie: Oh, thank you very much.

Shall we give the oral argument until 12:30, then?

The Court: No, we cannot do that because the jury always have engagements at 12:00 o'clock, gentlemen.

Mr. Lillie: Well, shall we open our arguments?

The Court: Yes.

Mr. Lillie: I will take 10 minutes and then split the argument. Is that all right, your Honor?

The Court: Yes. You may take all of your 30 minutes in opening or all of it in closing, or you can split it any way you want to.

Mr. Lillie: Thank you, your Honor.

The Court: All right.

(The jury returned to the court room at 11:28 o'clock a. m.)

The Court: Mr. Cross, will you please keep time and give counsel on both sides a three-minute warning?

The Clerk: Yes, your Honor. Do you want 10 minutes?

Mr. Lillie: To open, yes.

The Court: Let the record show that the jury are present and counsel are in court for the plaintiff and the defendants.

We have agreed on an argument of half an hour on each side. The government will open, having the burden of proof, and the government may use all or any part of the 30 minutes [178] in opening and whatever remains they can use in closing. The defendants will speak between the opening and closing statements of the government and may use all of 30 minutes or any part of 30 minutes.

I recognize the government.

(Argument.) [179]

Court's Instructions to the Jury

The Court: Ladies and gentlemen of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as judges to follow the law as I shall state it to you.

On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

On the 11th day of December, 1946, there was filed in this court, in the District Court of the United States, in and for the Southern District of California, Central Division, an action wherein the United States of America is the plaintiff against the Douglas Aircraft Co., Inc., a corporation, and Thomas W. Scott, defendants. The case is No. 6074.

The issues are not difficult in the case. They are simple. I have read to you the complaint of the government and the answer of the defendants. I feel it is not necessary to read again the complaint and the answer unless counsel for the government or the defendants desire the complaint and answer to be read.

Government?

Mr. Lillie: No, your Honor.

Mr. Brewer: No, your Honor:

The Court: In every civil action, as in this one, the burden is on the plaintiff to prove his or her case by a preponderance [180] of the evidence, and the defendant must prove by a preponderance of the evidence its affirmative defenses.

General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect

that one did look but did not see that which was in plain sight, it follows that that person was negligently inattentive.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplishes the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

The issues to be determined in this case are these:

First, Were the defendants negligent?

If your answer to that question is in the negative, you will return a verdict for the defendants. If your answer is in the affirmative, you have a second choice to determine, namely:

Was that negligence a proximate cause of the damage to the plaintiff.

If you answer that question in the negative, plaintiff is not entitled to recover; but if you answer it in the affirmative, [181] you then must find on a third question:

Was the plaintiff or any of its agents, servants or employees negligent?

If you find that they, the said agents, servants or employees of the plaintiff, were not negligent, after having found in plaintiff's favor on the other two issues, you must fix the amount of plaintiff's damages and return the verdict in its favor.

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If, however, you find that the plaintiff, the United States of America, or its agents, servants or employees, or either of them, were negligent then you must determine a fourth issue, namely:

Did that negligence contribute in any degree as the proximate cause of the accident?

If you find that it did, your verdict must be for the defendants. But if you find that it did not and you previously have found that there was negligence on defendants' part which proximately caused plaintiff's damage, you then must fix the amount of plaintiff's damages and return a verdict in its favor.

As indicated in these instructions, you should first determine the question of liability before you undertake to fix an amount that would compensate for damages found to have been suffered.

The burden is upon the plaintiff to prove by a preponderance [182] of the evidence that the defendants were negligent and that such negligence was the proximate cause of the damage to the plaintiff.

If the plaintiff has not fulfilled this burden, the defendants are entitled to your verdict and you need not consider the issue of contributory negligence.

If, however, plaintiff has fulfilled this burden as against the defendants, it is entitled to recover unless the defense of contributory negligence has been established under the court's instructions.

To establish this defense, the burden is upon the defendants to prove by a preponderance of evidence that the plaintiff through its agents, servants or employees was negligent and that such negligence contributed in

some degree as a proximate cause of the injury. If this burden has been fulfilled, the defendants are entitled to your verdict. If not fulfilled, your decision on this issue of contributory negligence must be in plaintiff's favor.

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

The law does not permit you to guess or to speculate as to the cause of the accident in question. If the evidence is equally balanced on the issues of negligence or proximate cause so that it does not preponderate in favor of the party [183] making the charge, then the party making that charge has failed to fulfill its burden of proof. To put the matter in another way, if after considering all the evidence you should find that it is just as probable that either of the defendants were not negligent or if they were their negligence was not a proximate cause of the accident, as it is that some negligence on their part was such a cause, then a case against the defendants has not been established.

By the same principle, it follows that if you should find that it is just as probable that plaintiff through its agents, servants or employees, was free from negligence, or even if negligent, that such negligence did not contribute as a proximate cause of the damage, as it is that negligence on the part of the plaintiff's agents, servants or employees did contribute as a proximate cause, then the defense of contributory negligence has not been established.

In determining whether negligence or proximate cause or contributory negligence has been proved by a pre-

ponderance of evidence, you should consider all the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from evidence that favor its cause or defense when produced by its adversary as when produced by itself. Thus if evidence presented by the plaintiff itself should support a finding that it was guilty of contributory negligence, that finding would be adequately [184] supported, even if the defendant produced no additional evidence to the same effect. In like manner, the defendants' own evidence may show and support a finding of negligence on their part.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. This simply denotes an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it.

The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of proof or excuse. If you should find that there was negligent conduct on the part of more than one party, you are not to attempt to determine which was guilty of the greater negligence, with a view to delivering a verdict in favor of, or to favor in any way, the party whose conduct was the less reprehensible.

If you find that any party to this action was, or all were, negligent, you will follow the court's instructions, in determining whether or not liability should attach and do so without regard to how you might grade or

compare the [185] negligence involved if permitted to do so.

A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.

You are instructed that the United States of America being a governmental body can only act through its agents, servants and employees. Therefore, if you find in this case that some agent, servant or employee of the United States acting within the scope and purpose of his employment was negligent and if you further find that such negligence upon the part of such agent, servant or employee, if any, was a proximate cause of the damages claimed by the plaintiff, United States of America, then I instruct you that you shall find a verdict for the defendants.

The defendant Douglas Aircraft Company, Inc., is a corporation and as such can only act through its officers or [186] employees, who are its agents. The acts or omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is.

Contributory negligence is negligence upon the part of the party claiming damages or its agents acting within the scope of their authority which, cooperating in some degree with the negligence of another, helps in proximately causing the damage of which the former thereafter complains.

If adhering to the court's instructions you should find the plaintiff is entitled to a verdict against defendants it then will be your duty to award plaintiff such amount of damage as will compensate him reasonably for all detriment suffered by him and of which defendants' negligence as found by you was a proximate cause whether such detriment could have been anticipated or not.

The amount of damages alleged in the complaint for the repair of the airplane is \$10,590.55. This allegation is merely a claim. However, if you find from the evidence that the sum of \$10,590.55 is a reasonable value of the necessary expense for the repair of said airplane, then such is the measure of damages.

The term "preponderance of the evidence" is not a mere figure of speech, nor is to be lightly looked upon by the jury. It is a substantial right given by law that you cannot [187] render a verdict against a defendant unless the plaintiff has established his or her case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. If in your final estimate the evidence is equally balanced as between the plaintiff and the defendants, then the defendants are entitled to your verdict. On the other hand, any preponderance of the evidence in plaintiff's favor, however slight, that preponderance requires a verdict against the defendants.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof to prove his allegations by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty because such proof is rarely possible.

In a civil action, such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side and if it causes the jurors to believe that on that issue the probability of truth favors that party.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified [188] upon this trial.

In judging of the credibility of witnesses you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be repelled by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony or by evidence.

In judging the credibility of the witnesses in this case you may believe the whole or any part of the evidence of any witness or may disbelieve the whole or any part of it as may be dictated by your judgment as reasonable men and women.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he

bears to the parties to this action, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of [189] the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evi-

dence you shall believe that the probability of truth favors his testimony in other particulars.

Evidence may be either direct or indirect.

Direct evidence is that which proves a fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes the fact. [190]

Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect, but unless so controverted the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature.

The word "propensity," as used in this instruction, means any natural or habitual inclination or tendency.

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any [191] evidence offered and rejected or which has been stricken out by the court. Such evi-

dence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom as directed in my instructions and in accordance with the law as I state it to you.

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is merely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence or as to the credibility of the witness.

In admitting evidence to which an objection is made the court does not determine what weight should be given to such evidence. As to any offer of evidence that was rejected by the court, you, of course, must not consider the same. As to any question to which an objection was sustained, you *must conjecture* as to what the answer may have been or as to the reason for the objection.

In judging of the evidence you are to give it a reasonable and fair construction and you are not authorized because of any [192] feeling of sympathy or other bias to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended

by me and none should be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others; but you are to consider all the instructions as a whole and to regard each in the light of all the others.

You are instructed that if the judge has done or said anything which would suggest to you that I am *in* inclined to favor the claims or position of either party; you will not suffer yourself to be influenced by any such suggestion.

While the Federal Judges are permitted to comment upon the evidence, I have not done so. I have not expressed nor intended to express, nor have I intimated nor intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established or what inferences should be drawn from the evidence adduced.

If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

You must weigh and consider this case without regard to [193] sympathy or prejudice or passion for or against any party to this action.

The attitude of jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious.

Remember that you are not partisans or advocates in this matter but you are judges. The final test of the quality of your service will lie in the verdict which you return to this court room and not in the opinions that any of you hold as you retire.

Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case.

To that end the court would remind you that in your deliberations in the juryroom there can be no triumph, excepting the assertion and declaration of the truth.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.

To each of you I would say that you must decide the case [194] for yourself but should do so only after a consideration of the case with your fellow jurors. And you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Upon retiring to the juryroom you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you agree.

As soon as all of you shall have agreed upon a unanimous verdict, you shall have it signed and dated by your

foreman, and you shall then return with it into this court room.

Two forms of verdict will be handed to you:

"In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Douglas Aircraft Co., a corporation, and Thomas W. Scott, defendants.

"No. 6074-O'C.

"We, the jury in the above-entitled cause, find the issues in favor of the defendants.

"Dated: Los Angeles, California, May 14, 1947. [195]

"_____

Foreman of the Jury."

The other form of verdict is:

"In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Douglas Aircraft Co., a corporation, and Thomas W. Scott, defendants.

"No. 6074-O'C.

"Verdict of the Jury.

"We, the jury in the above-entitled cause, find the issues in favor of the plaintiff, and assess its damages in the sum of \$_____.

"Dated: Los Angeles, California, May 14, 1947.

"_____

Foreman of the Jury."

Swear the bailiffs.

Mr. Brewer: Your Honor, may I address the court a moment?

The Court: Yes.

Mr. Brewer: I was keeping track of these instructions. I may be wrong, but it seems through some inadvertence that Nos. 13, 14, 15 and 16 were not read.

The Court: Thank you very much. I shall examine them.

(Brief pause in the proceedings.)

The Court: Out of an abundance of caution I shall read [196]

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Negligence is not an absolute term but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are a part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask:

"What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?"

Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skilfull one, but a person of reasonable [197] and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Ordinary care is not care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

The proximate cause of an injury is that cause which, in natural and continuous sequence, if unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

Swear the bailiffs.

(Whereupon, the bailiffs were duly sworn.)

(At 2:20 o'clock p. m., the jury retired to the jury room for deliberation.)

The Court: Will the attorneys check the exhibits now with the bailiff?

Court is in recess.

(Recess.)

(Whereupon, at 3:55 o'clock p. m., the jury returned to the court room.)

The Court: May I have the file, Mr. Cross? [198]

The Clerk: Yes, your Honor.

The Court: I shall read again the instruction with reference to damages.

The question of the jury is that "if the decision is in favor of the plaintiff, has the jury the authority to fix the amount of damages."

That is your exclusive province, ladies and gentlemen, to fix the measure of damages if you find for the plaintiff.

The second question: "if the jury decides that the evidence shows contributory negligence on the part of the plaintiff, in whose favor should the verdict be rendered according to the judge's instructions?"

The court's answer to that is that if you find that there was contributory negligence on the part of the plaintiff, the judgment then would be for the defendants.

You may retire and consider further your verdict.

(Whereupon, at 4:00 o'clock p. m. the jury retired from the court room.)

Mr. Lillie: If the court please, it might well be that the actual amount that was expended, if that was a reasonable amount, the figure—I imagine that was the problem in their mind.

The Court: Yes. Well, I gave them the instructions and gave them the amount.

Mr. Lillie: Originally. [199]

The Court: Originally, yes.

Mr. Lillie: I do not imagine they have any recollection as to the amount, and that was what the requested instruction was for.

The Court: Well, the only question they asked was if they had the right to fix the amount.

Mr. Lillie: Oh, I see.

The Court: So I said, "Yes."

Mr. Lillie: I see. Thank you.

The Court: Here it is:

"If the decision is in favor of the plaintiff, has the jury the authority to fix the amount of damages?"

Mr. Lillie: I beg your pardon. I didn't understand that.

The Court: So you can both get consolation and neither can get consolation under that.

Court is in recess.

(Recess.)

(Whereupon, at 4:50 o'clock p. m. the jury returned to the court room.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

Juror Charles T. Pike (Foreman of the Jury): Yes, we have, your Honor.

The Court: Will you please hand it to the bailiff? [200]

(Brief pause in the proceedings.)

The Court: The clerk will read the verdict.

The Clerk (Reading): "In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Douglas Aircraft Company, Inc., a corporation, and Thomas W. Scott, defendants.

"No. 6074-O'C Civil

"Verdict of the jury.

"We, the jury in the above-entitled cause, find the issues in favor of the defendants.

"Dated Los Angeles, California, May 14, 1947.

"Signed: Chas. T. Pike, Foreman of the Jury."

The Court: Does either side wish the jury polled?

Mr. Lillie: No, your Honor.

Mr. Brewer: No, your Honor.

The Court: Ladies and gentlemen, you will be excused until further notified by the clerk to report for further duty. Thank you.

(Whereupon, at 4:53 o'clock p. m. the jury was excused and the hearing in the above-entitled matter closed.)

[Endorsed]: Filed Oct. 13, 1947. Edmund L. Smith, Clerk. [201]

[Endorsed]: No. 11759. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Douglas Aircraft Co., Inc., a corporation and Thomas W. Scott, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 16, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11759

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Points upon which appellant intends to rely on the appeal are as follows:

1. The Court erred in not granting plaintiff's motion for a directed verdict at the conclusion of the trial.
2. The Court erred in not finding as a matter of law that the plaintiff's acts did not constitute contributory negligence.
3. The Court erred in not finding as a matter of law that the proximate cause of plaintiff's damage was the negligence of the defendants.
4. The Court erred in permitting the cause to go to the jury.
5. The Court erred in not granting plaintiff's motion for judgment or a new trial.

6. The evidence does not sustain the verdict of the jury.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorney for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct 16, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

AFFIDAVIT IN SUPPORT OF APPLICATION TO
BE RELIEVED FROM PRINTING AND RE-
PRODUCING EXHIBITS

State of California

County of Los Angeles—ss.

Cameron L. Lillie, Assistant United States Attorney,
being first duly sworn, deposes and says:

That as part of the records in the above-entitled case
there are as exhibits one large map and 47 photographs;

That due to the size of the map and the large number
of photographs which compose both the plaintiff's and
the defendants' exhibits your affiant believes that said
exhibits are not of printable type, for the reason that all
of the exhibits are photographs except for the one large
map and that the original photographs would be of more
assistance to the Court than an attempted reproduction

of said photographs printed on transcript paper. In addition thereto, that said exhibits are very voluminous and the cost of said reproduction would be excessive.

Your affiant therefore requests this Honorable Court to be relieved from having said exhibits printed and reproduced in the transcript and for the Court to consider said exhibits in their original form.

CAMERON L. LILLIE
Assistant United States Attorney

Subscribed and sworn to before me this 15th day of October, 1947.

(Seal) EDMUND L. SMITH
Clerk of the District Court, Southern District of
California

By Edw. F. Drew

Deputy

[Title of Circuit Court of Appeals and Cause]

ORDER

Upon reading the affidavit of Cameron L. Lillie, Assistant United States Attorney, and good cause appearing therefor

It Is Ordered that the appellant be relieved from having the exhibits printed and reproduced in the transcript and that said exhibits will be considered by said court in their original form without reproduction.

Dated: Oct. 16, 1947.

WILLIAM DENMAN
Judge, Circuit Court of Appeals

[Endorsed]: Filed Oct. 17, 1947. Paul P. O'Brien,
Clerk.

No. 11759

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS
W. SCOTT,

Appellees.

APPELLANT'S OPENING BRIEF.

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Acting Chief, Civil Division,

CAMERON L. LILLIE,
Assistant U. S. Attorney,

600 United States Postoffice and
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Attorneys for Appellant.

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No. 11759

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS
W. SCOTT,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This action was brought in the District Court of the United States for the Southern District of California, pursuant to the provisions of Section 24 of the Judicial Code, Title 28, U. S. C., Section 41(1)(2). Judgment was entered therein May 14, 1947. Notice of appeal was filed on August 8, 1947. The United States Court of Appeals for the Ninth Circuit has jurisdiction under Section 28 of the Judicial Code (Title 28, U. S. C., Sec. 225).

Statement of the Case.

This is an appeal from a jury verdict in favor of the defendant in an action for damages brought by the United States Government. It prays for the sum of \$10,590.55 damages to a Government-owned airplane as a result of

a collision occurring with an airplane owned and operated by the defendants. The accident occurred at the Los Angeles Municipal Airport on November 11, 1943, at 2 o'clock in the afternoon, with visibility unlimited.

Defendants in their answer deny any liability on their part and allege negligence on the part of the plaintiff in parking the Government's plane on the diagonal runway and, further, negligence on the part of the control officers at the air traffic control tower in directing defendant to proceed without warning of the parked plane. They further allege that the plaintiff's negligence did proximately cause and contribute to the accident.

Statement of Facts.

It is the plaintiff's contention that there was no dispute in the facts introduced in evidence.

Witnesses for the Government and defendants alike testified as follows:

That on November 11, 1943, at the Los Angeles Municipal Airport, Los Angeles, California, on a diagonal runway, a collision occurred between a P-51 airplane, having a 37-foot wing spread, owned and operated by the plaintiff, and a S.B.D. airplane, having a 42-foot wing spread, owned and operated by the defendants, whereby damage in the sum of \$10,589.61 occurred to the plaintiff's plane.

The Los Angeles Municipal Airport consists of two main runways which are 300 feet wide, macadamized strips running the length of the field, parallel to each other but separated by a clear plot of ground. Diagonally, from the four corners of the field 150 feet wide, macadamized runways bisect the main runways.

The Los Angeles Municipal Airport, at the time of the accident, was managed by employees of the City of Los Angeles. The United States Government was a tenant of the City of Los Angeles, as were many others, including the Civil Aeronautics Authority, an agency of the Government, whose employees operated the air traffic control tower.

A. W. Pitcairn, the operator of the plaintiff's P-51 airplane, was employed by the North American Aviation Company as an experienced pilot, authorized to make test flights for the Government.

On November 11, 1943, the day of the accident, Pitcairn, since deceased, was assigned to make a test flight for the Government to determine the air flow characteristics of the coolant scoop of the P-51 aircraft (the one involved).

In accordance with custom, practice, and usage at the Los Angeles Municipal Airport, the air traffic control tower was informed that said test was to be made. It was the custom, practice and usage that in this type of test the plane to be tested would be towed to its starting point rather than taxied under its own power because dust blown by the propeller upon taxiing the plane would be thrown into the scoop, which would close up the rake openings, thereby nullifying the test. This was true also upon landing, and to prevent this happening when the plane wheels touched the ground the pilot would cut the motor and coast down the main runway to the intersection of the diagonal runway, turn down the diagonal runway and park as close to the edge as possible, requesting the control tower for the tow tractor to come out and tow the plane.

The plaintiff's P-51 aircraft was towed by a tractor out onto the landing strip, whereupon it took off for its test flight. The P-51, on its return to the field, landed, with permission of the air traffic control tower, on the main runway, 25-L, which was to the left running parallel to the main runway, 25-R. The pilot immediately cut off the motor, coasting down the runway to the intersection of the diagonal runway where the plane turned to the left and parked on the right side of the diagonal runway with its wheels on the edge of the macadam, its right wing extending over and beyond the macadam onto the unpaved portion of the airport. The diagonal runway being 150 feet in width, the P-51 airplane so parked left better than a 120-foot passage for other planes to taxi on the diagonal runway. Pitcairn, the pilot, immediately contacted the air traffic control tower by radio, requesting a tractor to tow the P-51 onto the ramp.

Thomas W. Scott, one of the defendants, was operating a Douglas S.B.D. airplane which collided with the P-51. He was employed by Douglas Aircraft Company to conduct regular production tests on S.B.D. airplanes and had been conducting a number of such tests at the time of the collision.

While still in the air, operators in the air traffic control tower gave Scott permission to land his S.B.D. plane and, pursuant thereto, he landed the S.B.D. plane on runway 25-R, coasting down to the diagonal runway, then turning left into said diagonal runway until he approached the opening of the intersection where the diagonal runway crossed the main runway, 25-L. Scott then held his position there and watched a plane take off on the main runway, 25-L. The control tower then gave him permission to cross the main runway. Scott taxied the

S.B.D. airplane across the main runway, 25-L, in a hurry, and upon entering the diagonal runway on the other side of the main runway he started S-ing (essing) his plane. Completing the first turn, he collided with the P-51 parked on the edge of the runway. Scott testified he S-ed (essed) so he could see in front of his plane. He could not remember if he looked all the way down the diagonal runway but knew he could see all the way down; that he definitely did look down the diagonal runway after stopping at the intersection of the main runway, 25-L, and the diagonal runway; when he S-ed (essed) down the diagonal runway before the collision he did not look directly in front of him although he S-ed (essed) his plane right and left in order to get a clear, unobstructed view of the diagonal runway; that he looked ahead of him but did not see the plaintiff's P-51 airplane until he ran into it; that it was a clear day; that there was a 120-foot clearance on the side of plaintiff's plane, and even with the propeller revolving, you can see that area; and that he had good visibility in front and made 15-degree angles from center in S-ing (essing).

The fact that the defendant looked and did not see plaintiff's P-51 is borne out by his own testimony and conversation with Pitcairn at the scene of the accident and the fact that the brakes were applied by Scott at about the time of the impact.

The air traffic control tower operators do not customarily warn of obstructions in runways when planes are taxiing. This is especially true where the obstruction is

in plain view. Further, at the time of the accident in question heavy air traffic ensued and at all times and under all conditions air traffic takes precedence over field traffic. There are no field rules restricting parking on the edge of the diagonal runways.

Assignment of Errors.

Points upon which appellant intends to rely on the appeal are as follows:

1. The Court erred in not granting plaintiff's motion for a directed verdict at the conclusion of the trial.

2. The Court erred in not finding as a matter of law that the plaintiff's acts did not constitute contributory negligence.

3. The Court erred in not finding as a matter of law that the proximate cause of plaintiff's damage was the negligence of the defendants.

4. The Court erred in permitting the cause to go to the jury.

5. The Court erred in not granting plaintiff's motion for judgment or a new trial.

6. The evidence does not sustain the verdict of the jury.

For convenience in discussing the same, these six assignments of error will be divided into two main points.

- I. The Lower Court Erred in Denying Plaintiff's Motion for a Directed Verdict.

- II. The Evidence Is Insufficient to Sustain the Verdict of the Jury.

I.

**The Lower Court Erred in Denying Plaintiff's Motion
for a Directed Verdict.**

It is the Government's contention that the evidence is undisputed and should not have been submitted to the jury because from the facts only one inference can be drawn, that the proximate cause of the damage to the Government plane was the negligence of Defendant Pilot Scott in failing to look where he was going.

Generally, questions of negligence in actions like the present are for the jury, under proper directions as to the principles of law by which they are controlled. However, it is well settled that the Court may withdraw a case from the jury altogether and direct a verdict for the *plaintiff or defendant*, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. As the Court said in the case of *Brady v. Southern Ry. Co.* (320 U. S. 476) :

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. * * *"

Galloway v. United States, 319 U. S. 372;

Pence v. United States, 316 U. S. 332;

Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521;

Anderson v. Smith, 226 U. S. 439;

Coughran v. Bigelow, 164 U. S. 301;

Gunning v. Cooley, 281 U. S. 90.

A. The Failure of the Defendant Pilot in Looking and Not Seeing What Was in Plain Sight Constituted Negligence.

“Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, with reference to the situation and knowledge of the parties under all the attendant circumstances.”

Stephenson v. Southern Pacific Co., 102 Cal. 143;

Fouch v. Werner, 99 Cal. App. 557; 279 Pac. 183;

Terrell v. Key System, 69 Cal. App. (2d) 682; 159 P. (2d) 704;

Toschi v. Christian, 24 Cal. (2d) 354; 149 P. (2d) 848;

Parrot v. Wells Fargo & Co., 82 U. S. 524;

Bramley v. Dilworth, 274 Fed. 267.

The undisputed evidence discloses that the Government's P-51 plane at the time of the collision was parked upon a taxi strip on a diagonal runway; the diagonal runway was 150 feet in width; Pitcairn, the pilot of the P-51, was seated therein, with the motor dead and the plane incapable of movement; that he had shut off his motor upon the wheels of the plane touching the ground; and that thereafter, having crossed into the diagonal runway, Pitcairn had contacted the operators of the air traffic control tower, requesting a tractor to be sent out to the parked plane to tow it onto the ramp. The P-51, it was testified, was parked with its right wheel close to the edge of the diagonal runway so that only the fuselage and left wing protruded into the taxi strip, leaving better than 120 feet of clearance for other planes to pass.

Defendant Pilot Scott testified that he landed on main runway 25-R at approximately 2 o'clock in the afternoon; that it was daytime and visibility was good; that he taxied down the diagonal runway, making S turns at a 15° angle in order to see that the way was clear, to approximately the intersection of the main runway 25-L (the runway upon which originally the Government plane had landed) and the diagonal runway he was on; that at that point he stopped and turned his plane in an easterly direction; that he stayed there a matter of a minute or a minute and a half and watched a plane take off in a westerly direction from main runway 25-L; and, further, he looked across the main runway 25-L and down the diagonal runway that he was on, and upon which the Government's P-51 was parked; that he then requested permission from the air traffic control tower to cross the main runway 25-L, which he did, but that he crossed it "in a hurry" as he was anxious to get across the main runway in case somebody else might be landing that he didn't see; that after he crossed main runway 25-L and had entered into the diagonal on which the Government's P-51 was parked he started taxiing and S-ing his plane in a 15° angle from right to left in order to see whether his way was clear; that he looked but did not see the Government plane and collided with it.

Defendant Pilot Scott further stated that he taxied slowly at a speed of from 8 to 10 miles an hour as a safety measure and that he S-ed from right to left in order to get a clear view of the diagonal runway upon which he was traveling; and that even when the plane was headed straight ahead and the propeller was revolving he could see the area before him.

The defense placed upon the stand three witnesses who testified without any equivocation that they could see from a distance of over 300 feet, not only the Government P-51 parked upon the diagonal taxi strip, but that they saw the Government's pilot, Pitcairn, when he talked to the air traffic control tower, requesting the tow tractor.

"The general test of negligence is foreseeability. Conduct is negligent when some unreasonable risk or danger to others would have been foreseen by a reasonable person."

Sweatman v. L. A. Gas & Elec. Corp., 101 Cal. App. 318; 281 Pac. 677;

Asher v. Pacific Electric Ry. Co., 42 Cal. App. 712; 187 Pac. 976;

Schwerin v. Capwell, 140 Cal. App. 1; 34 P. (2d) 1050;

Eigner v. Race, 54 Cal. App. (2d) 506; 129 P. (2d) 444;

Parrot v. Wells Fargo & Co., *supra*.

By the defendants' evidence produced at the trial, Defendant Pilot Scott had a duty, as a reasonable man under all the attendant circumstances, to maintain a lookout in taxiing the defendant's S.B.D. airplane and to avoid running into and injuring the person or property of others. The defendants admitted that visibility was good, that it was a clear day, clear enough, in fact, that the pilot could be seen at a distance of over 300 feet talking into a microphone in the parked plane. The very act that the defendant pilot was doing, to wit, taxiing at a slow rate of speed, S-ing his plane in 15° angles from right to left to avoid running into any other person that might be upon the diagonal runway, shows that unless

precautions of this type were taken damage or injury to others might occur.

The defendant further testified that he looked, not one time but continued looking all the time, and he did not see the parked P-51 airplane of the plaintiff. It was further testified that when tests of this type were made it was the custom and practice to park the planes on the diagonal runways, leaving the remainder of the runway for other taxiing planes to pass.

“One is deemed negligent where he fails to see what is in plain sight. Failure to maintain a proper lookout is negligence.”

Reaugh v. Cudahy-Packing Company, 189 Cal. 335; 208 Pac. 125;

Truitner v. Knight, 83 Cal. App. 655; 257 Pac. 447;

Nichols v. Nelson, 80 Cal. App. 590; 252 Pac. 739;

Mahar v. Mackay, 55 Cal. App. (2d) 869; 132 P. (2d) 42;

White v. Davis, 103 Cal. App. 531; 284 Pac. 1086.

It is a general rule of law that where the injury or damage has resulted from an operation of an instrumentality the operator is held to have been responsible where it appears that he ought to have foreseen and prevented the injury or damage.

It is apparent that by the very evidence produced in defense of this action that Defendant Pilot Scott violated the duties incumbent upon him as a reasonable man under the circumstances. One cannot be heard to say “he looked but did not see what was in plain sight.” The failure to keep proper lookout constituted negligence upon the part of Defendant Pilot Scott.

In *Williams v. Pacific R. R. Co.* (177 Cal. 235; 170 Pac. 423), the Court said:

“Where it appears from the undisputed facts, judged in the common light of knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in like positions, or that the necessity of doing a particular act is apparent, and the custom of performing such act under certain circumstances is universal and relied upon, negligence may be declared as a matter of law.”

Chrissinger v. Southern Pac. Co., 169 Cal. 619; 149 Pac. 175;

Litlerbury v. Kimmet, 183 Cal. 24; 195 Pac. 660;

Woodhead v. Wilkinson, 181 Cal. 599; 185 Pac. 851.

The Government therefore submits that the Court erred in submitting to the jury the question of the negligence of Defendant Pilot Scott for the undisputed facts judged in the light of common knowledge and experience disclosed that Defendant Pilot Scott had not exercised such care as a reasonable man would in a like or similar circumstance.

B. Plaintiff's and Appellant's Acts Did Not Constitute Contributory Negligence.

It was at all times contended by the defendants that the parking of the plane by the Government's pilot, Pitcairn, on the diagonal runway, and the failure on the part of the operators of the air traffic control tower to notify Defendant Pilot Scott that the Government's plane was so parked, shows contributory negligence on plaintiff's part.

Like the defendants' negligence, contributory negligence becomes a question of law when the evidence is such that the Court is impelled to see that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference.

Hamlin v. Pac. Elec. Ry. Co., 150 Cal. 776; 89 Pac. 1109;

Reaugh v. Cudahy Packing Co., 189 Cal. 335; 208 Pac. 125;

Young v. Southern Pacific Co., 182 Cal. 369; 190 Pac. 36;

Minter v. San Diego Consol Gas et al. Co., 180 Cal. 723; 182 Pac. 749.

“Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as concurring or cooperating with the negligent act of the defendant, is the proximate cause of the injury complained of.”

Straten v. Spencer, 52 Cal. App. 98; 197 Pac. 540;

Rush v. Lagomarsino, 196 Cal. 308; 237 Pac. 1066;

Gaster v. Hinkley, 85 Cal. App. 55; 258 Pac. 988;

Hartford v. Pac. Motor Trucking Co., 16 Cal. App. (2d) 378; 60 P. (2d) 476.

Merely because one person is at fault does not dispense with the duty of another to use ordinary care. Although an attempt was made by the defendants to substantiate a defense of contributory negligence, the facts do not show that the parking of the plaintiff's P-51 plane on the edge of the diagonal runway was a violation of any rules or regulations applicable to the field. Rather, it is shown that the test of the P-51 plane was conducted under the

usage and custom in effect at that time. Three times the amount of space was left for passage on the diagonal runway as would have been taken up by the defendants' S.B.D. plane. The Government's employees, the operators of the air traffic control tower, had the duty of handling air traffic, yet without question air traffic took precedence over ground traffic, and at the time of the collision, and just prior thereto, air traffic was very heavy. In fact, it was testified to, and uncontradicted, that the usual custom and practice of the operators of the air traffic control tower did not include giving notice of obstructions on the field, especially so when an object was in plain sight.

From all the evidence it is undisputed that there were no rules preventing the parking of the Government P-51 plane on the diagonal runway. In fact, it was custom and usage to do so. Further, there was no duty upon the part of the operators of the air traffic control tower to notify taxiing planes of objects on the field. There being no violation of any legal duty in the parking of the plane, and there being no omission of any duty by the operators of the air traffic control tower in failing to notify the defendant pilot that a plane was so parked, negligence cannot be found on either the part of the Government's pilot nor the employees of the air traffic control tower. It is a general rule of law that without such a legal duty any injury is *damnum absque injuria*—injury without wrong.

It is respectfully submitted that the Court not only erred in giving Defendants' Instructions Nos. 18, 19, 21, 22, 23, 25 and 29 on contributory negligence, over the

objection of the plaintiff, but also erred in submitting the question of contributory negligence to the jury. Only one reasonable inference may be drawn from the undisputed facts: there being no legal duty owing to the defendants by the plaintiff's employees or agents, there can be no contributory negligence.

C. For Contributory Negligence on the Part of the Appellant, His Purported Negligence Must Concur or Cooperate With the Negligent Act of the Defendant.

Before negligence of the plaintiff can rise to the heights of contributory negligence that negligence must concur or cooperate with the negligent act of the defendant, both being the proximate cause of the injury or damage complained of. For the sake of argument, if the aforementioned facts could be construed an omission or violation of a legal duty owing the defendants on the part of the plaintiff's employees or agents, and therefore negligence, it is the appellant's position that the defense of contributory negligence would not be available to the defendants and the Court erred in instructing the jury on contributory negligence.

"The rule as to when a directed verdict is proper heretofore referred to, is applicable to questions of proximate cause."

Brady v. Southern Ry. Co., 320 U. S. 476;

Atchison Topeka & Santa Fe Ry. Co. v. Toops,
281 U. S. 351;

St. Louis etc. Ry. Co. v. Mills, 271 U. S. 344;

N. Y. Central Ry. Co. v. Ambrose, 280 U. S. 486;

Baltimore & Ohio Ry. Co. v. Tindall, 47 F. (2d)

Where but one deduction can be drawn from the evidence, as in the instant case, the question of proximate cause is one of law only.

Zibbell v. Southern Pacific Co., 160 Cal. 237; 116 Pac. 513;

Flores v. Fitzgerald, 204 Cal. 374; 268 Pac. 369;

White v. Davis, 103 Cal. App. 531; 284 Pac. 1086;

Donegan v. Baltimore & N. Y. Ry. Co., 165 Fed. 860;

Winters v. Baltimore & Ohio Ry. Co., 177 Fed. 44; 100 C. C. A. 462;

Hales v. Michigan Central Ry. Co., 200 Fed. 533; 188 C. C. A. 627;

San Francisco & P. S. S. Co. v. Carlson, 161 Fed. 851; 89 C. C. A. 45;

Pacific SS Co. v. Holt, 77 F. (2d) 192;

Jennings v. Davis, 187 F. 703; 109 C. C. A. 451.

“Proximate cause is an act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted; the dominate cause, not one which is incidental to that cause.”

Herron v. Smith Bros. Inc., 116 Cal. App. 518; 2 P. (2d) 1012;

Sawdey v. R. W. Rasmussen Co. et al., 210 Cal. 190; 290 Pac. 684;

Rauch v. Southern Calif. Gas Co., 96 Cal. App. 250; 273 Pac. 1111.

It is the general rule of law that an original act of negligence is not a proximate cause of an injury when the same directly results from an intervening act of another party which was not to be reasonably anticipated by the first party as likely to occur and follow through from his own act.

“Recovery of the plaintiff is not barred if his negligence is so remote as to constitute a condition and not a cause.”

Rush v. Lagomarsino, supra;

Gaster v. Hinkley, supra;

Hartford v. Pac. Motor Trucking Co., supra.

In 1 Thompson on Negligence, page 210, Section 216, it is said:

“In order, then, to prevent a recovery by reason of contributory negligence, the plaintiff or person injured must have been guilty of want of ordinary care; and we shall see that this want of ordinary care must have been a proximate cause of the injury, and not a remote cause or mere condition. If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages, if notwithstanding such remote negligence of the plaintiff the defendant might have avoided the injury by the exercise of ordinary care. But if a want of ordinary care on the part of the person injured *concur*s as a proximate cause in producing the injury, the defendant is not liable, although in fault. * * * it must be such that, by the usual course of events, it would result, unless independent disturbing moral agencies intervened, in the particular injury.”

From the undisputed evidence, the tests being conducted on the Government's P-51 plane were carried out under the custom and usage and practice in effect at the Los Angeles Municipal Airport. And, further, the undisputed facts show that the operators of the air traffic control tower did not notify taxiing planes of obstructions on diagonal runways when they were in plain sight.

It cannot be said that the Government pilot, Pitcairn, could reasonably anticipate at the time he was waiting in the parked plane for the tractor to tow the plane to the ramp that Defendant Pilot Scott would fail to see the parked airplane which was in plain sight. Neither could the operators of the air traffic control tower reasonably anticipate that Defendant Pilot Scott would fail to see the P-51 parked on the diagonal runway. To support this argument it must be kept in mind that the collision occurred in broad daylight; the Government plane was parked so that there was more than 120 feet of clearance on the diagonal runway for Defendant Pilot Scott to use in taxiing by; and, further, that it was uncontradicted in the testimony that the operators of the air traffic control tower did not warn taxiing pilots of obstructions in plain sight on the field. On this theory, therefore, it cannot be said that the fact that the Government's plane was parked on the diagonal runway, or that the operators of the air traffic control tower had not notified Defendant Pilot Scott that the Government plane was so parked, would be the cause which in the natural order of things and under the circumstances would necessarily produce the injury. The efficient cause and the proximate cause of the plaintiff's damage was the failure of Defendant Pilot Scott in looking and failing to see what was in plain sight. The facts clearly show Defendant Pilot Scott could have avoided

the accident had he been exercising that degree of care required of him in operating the S.B.D. plane of Defendant Douglas Aircraft Company.

The only possible view that can be taken of the evidence was that Defendant Pilot Scott either did not look at all or, if he did, that he saw the airplane and carelessly taxied into it. His act, being negligent, is a matter of law.

D. There Was No Evidence of Unavoidable Accident Present.

The trial court, over the objection of the plaintiff, gave Defendants' Instructions No. 24 on unavoidable accident. It is submitted this was error. In *Eigner v. Rase*, 129 P. (2d) 444; 54 Cal. App. (2d) 506, the Court said:

“When we refer to an unavoidable accident, we do not mean one which it was physically impossible in the nature of things for the defendant to have prevented, but one in which ordinary care and diligence could not have prevented the happening of the thing that did happen; in other words, that what occurred happened unexpectedly and without fault and not because of negligence. The term ‘unavoidable accident’ has been defined as meaning an accident which cannot be avoided by that degree of prudence, foresight, care and caution which the law requires of anyone under the circumstances of the particular case, and which is not occasioned in any degree by want of such care and skill as the law holds every person bound to exercise. In short, an unexpected catastrophe or happening which occurs without anyone being to blame for it; that is, without being guilty of negligence in doing or permitting to be done, or omitting to do, a particular thing, which act or omission caused plaintiff's injury.”

See also

Jolley v. Clemens, 28 Cal. App. (2d) 55; 82 P. (2d) 51;

Polk v. Los Angeles, 26 Cal. (2d) 519; 159 P. (2d) 931.

The evidence here shows without contradiction that Defendant Pilot Scott had the S.B.D. airplane under control; was taxiing the plane by S-ing from left to right; that his view was unobstructed; and that Defendant Pilot Scott looked but did not see the parked P-51 plane of the plaintiff. Either Defendant Pilot Scott did not look or looked and did not see what was in plain sight. Had he looked or seen the parked P-51 airplane the accident could have been prevented. Defendant Pilot Scott did not use ordinary care under the circumstances and therefore was negligent, and where there is negligence it will be found that the accident was not unavoidable because it could have been foreseen.

E. The Court Erred in Not Granting Plaintiff's Motion for a Directed Verdict or, in the Alternative, a New Trial.

Plaintiff made a timely motion for a directed verdict which was denied by the trial court.

Where, as in the instant case, the facts established and the conclusions reasonably justified, as heretofore stated and argued, are legally insufficient to support the verdict in favor of the defendant, the Court must grant the mo-

tion for a directed verdict on the part of the plaintiff and it is error to refuse it.

“Court must grant motion for directed verdict whenever facts established and conclusions reasonably justified are legally insufficient as foundation for verdict in favor of plaintiff.” (*Chesapeake & O. Ry. Co. v. Martin*, 51 S. Ct. 453, 283 U. S. 209, 75 L. Ed. 983, reversing 143 S. E. 629, 154 Va. 1, and *Chesapeake & O. Ry. Co. v. Martin*, 51 S. Ct. 23, 282 U. S. 819, 75 L. Ed. 732.

McCarthy v. N. Y. N. H. & H. R. Co., 240 F. 602; 156 C. C. A. 406;

Steerman v. Baltimore O. R. Co., 6 App. D. C. 56;

Elliott v. Chicago M. & St. P. Ry., 14 S. Ct. 85; 150 U. S. 245.

“A federal court, in which a jury has rendered a verdict, may set it aside when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and, in the exercise of a legal discretion, may properly do so, though it would not have been proper to direct a verdict.

Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321;

Wright v. Southern Exp. Co., 80 Fed. 85.

It is submitted that in view of the evidence the trial court in its discretion should have set aside the verdict of the jury and granted the plaintiff a new trial.

II.

The Evidence Is Insufficient to Sustain the Verdict of the Jury.

Although this point is very closely connected with Point I hereinabove, and involves the same principles of law, we will, at the risk of being repetitious, point out to this Honorable Court how and in what manner the evidence fails in every way to justify the verdict for the defendants.

Under the undisputed facts, and by the defendant's own testimony, he was under a duty in taxiing an airplane to taxi at a slow rate of speed and make S turns from left to right at a 15° angle. The basis for such precautions was to enable the pilot at all times to observe any person or property in his path so that he might control his instrumentality and avoid running into any persons or property, causing injury or damage to others. This Defendant Pilot Scott attempted to do and he failed in his duty. By his own admission he looked and did not see the parked plane of the defendants which, from the evidence, was in plain sight. And by reason of his failure to see the plane of the plaintiff he negligently ran into it. There is no evidence in the record which would show a violation of a duty owing the defendants in the parking of the plaintiff's plane on the diagonal runway. This was the usage and custom at the Los Angeles Municipal Airport. Neither was there any omission of any duty on the part of the operators of the air traffic control tower in not giving the defendant pilot notice that the Government plane was so parked. The evidence showed without any equivocation that such a notice was not necessary if the parked airplane was in plain view. To go one step further, where obstructions were in plain view on the diagonal runways, it

was testified without any denial, the custom and usage at the Los Angeles Municipal Airport was not to call the attention of taxiing pilots to such objects. There was not one scintilla of evidence put before the trial court and the jury from which even an inference could be drawn to support the theory that the plaintiff's agents or employees were in any way contributorily negligent.

Taking the evidence *in toto* most favorable to the defendants, it is the Government's position that no reasonable inferences of contributory negligence on the part of the plaintiff's agents or employees can be drawn from the evidence introduced at the trial. Rather, it shows conclusively that the defendant pilot was negligent and his negligence was the proximate cause of the damage.

Conclusion.

In conclusion, it is the appellant's contention, and it is so borne out in the evidence in this case, and the applicable law thereto, that the cause should not have been submitted to the jury and the plaintiff's motion for directed verdict at the conclusion of the trial should have been granted. This contention is based on the evidence which is conclusive and undisputed, and on the applicable law which without equivocation discloses that no acts of the plaintiff constituted contributory negligence and that the proximate cause of the plaintiff's damage was the negligence of the defendants. Nor do we believe, for the same reasons, that the evidence is sufficient to justify a verdict in favor of the defendant.

For these reasons we respectfully ask this Honorable Court to set aside the judgment heretofore entered by the lower court and the verdict of the jury, and also direct the lower court to enter judgment for the plaintiff, and for such other and further relief as may seem just in the premises.

Respectfully submitted,

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No. 11759.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT Co., INC., a corporation, and THOMAS
W. SCOTT,

Appellees.

APPELLEES' BRIEF.

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Statement of Questions of Law Involved.

Appellant predicates its appeal on the following legal contentions:

(1) That the evidence showing negligence by the pilot of appellee's airplane was such that the trial court erred in not finding appellee negligent as a matter of law;

(2) That the evidence on the issue of contributory negligence of appellant was such that the trial court erred in not finding as a matter of law that appellant's acts did not constitute contributory negligence.

We believe that the evidence amply demonstrates that neither of the appellant's legal contentions are applicable to this case because there is insufficient evidence to show as a matter of law that the pilot of the appellee was guilty of negligence in failing to observe the government plane, and also because there was substantial evidence to show that the government was guilty of contributory negligence in several respects which would have barred its recovery in any event.

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No. 11759.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS
W. SCOTT,

Appellees.

APPELLEES' BRIEF.

Statement of the Case.

Appellant appeals from an adverse judgment after a jury verdict in favor of the defendant in an action brought by the appellant to recover the sum of \$10,589.61 as damages to a government owned airplane, resulting from a collision with an airplane owned and operated by appellee. At the time this collision occurred, on November 11, 1943, at the Los Angeles Municipal Airport, that airport was under the supervision of the Civil Aeronautics Authority, an agency of the United States Government, whose employees operated the air traffic control tower.

It is clear the jury found against the Government because of the Government's own contributory negligence or because it found that there was no negligence on the part of the operator of appellee's airplane. Either of these grounds would be sufficient to sustain the judgment and we believe that there is substantial evidence to support both of them.

Statement of Facts.

Taking the evidence which is favorable to appellee and supports the judgment as we are permitted to do, it appears that on November 11, 1943, at the Los Angeles Municipal Airport, Los Angeles, California, on a diagonal runway, which is known as No. 22, a collision occurred between a P-51 airplane [R. 28, 30, 48, 62, 83, 98, 104, 130, 134, 141] having a 37-foot wing spread [R. 33, 65, 71], owned [R. 23] and operated by the plaintiff [R. 31], and an S.B.D. airplane, having a 42½-foot wing spread [R. 63, 65], owned and operated by the defendants [R. 48], whereby damage in the sum of \$10,589.61 occurred to plaintiff's airplane [R. 25, 26].

The Los Angeles Municipal Airport consisted of two main runways which are 300 feet wide, macadamized strips running the length of the field, parallel to each other but separated by a clear plot of ground. Diagonally, from the four corners of the field, macadamized runways 150 feet wide bisect the main runways [Pltf. Ex. 1].

The Los Angeles Municipal Airport, at the time of the accident, was managed by employees of the City of Los Angeles. The United States Government was a tenant of the City of Los Angeles, as were many others, including the Civil Aeronautics Authority, an agency of the Government, whose employees operated the air traffic control tower and had complete charge of all air and ground traffic over and on said airfield, and in the air traffic pattern for 25 miles around said airfield [R. 78-81, 102, 103, 121, 122].

A. W. Pitcairn, the operator of the plaintiff's P-51 airplane, although employed by the North American Aviation Company as an experienced pilot, was at the time acting as an agent of appellant, authorized to make test flights for the Government [R. 31].

On November 11, 1943, the day of the accident, Pitcairn, since deceased [R. 46, 73], was assigned to make a test flight for the Government to determine the air flow characteristics of the coolant scoop of the P-51 aircraft, the airplane involved in the collision which is the subject of this litigation [R. 31]. This was alleged in the complaint and during the trial by the appellant, and he was thus an agent of the Government.

In accordance with custom, practice, and usage at the Los Angeles Municipal Airport, the air traffic control tower was informed that said test was to be made. It was the custom, practice and usage that in this type of test the plane to be tested would be towed to its starting point rather than taxied under its own power because dust blown by the propeller upon taxiing the plane would be thrown into the scoop, which would close up the rake openings, thereby nullifying the test [R. 31, 32, 33]. This was true also upon landing, and to prevent this happening when the plane wheels touched the ground the pilot would cut the motor and coast down the main runway to the intersection of the diagonal runway, turn down the diagonal runway and park, after having requested, before landing, that the control tower send for the tow tractor to come out and tow the plane [R. 33, 39-41]. The trac-

tors customarily used for towing planes used in this type of test were stored beneath the control tower [R. 40].

The plaintiff's P-51 aircraft was towed by a tractor out onto the landing strip, whereupon it took off for its test flight [R. 31, 33]. The P-51, on its return to the field, was ordered by the air traffic control tower to land on the main runway 25L [R. 44, 106, 114] which was to the left and parallel to the main runway 25R [Ex. 1], *and proceed to the parking ramp at the end of the field* [R. 116]. Pitcairn, the pilot of the P-51 airplane, immediately cut off the motor and coasted down the main runway to the intersection of the diagonal runway, and then turned to the left and parked on the right side of diagonal runway 22 near the edge of the runway. The evidence is in conflict whether the P-51 was parked on the runway with its wheels on the edge of the runway and its right wing extending over the grass alongside of the runway [R. 44, 45, 68-70], or whether it was parked entirely on the runway with its right wing approximately twenty feet from the edge of the runway [R. 84, 85, 131, 135, 136]. Pictures introduced in evidence indicated it was parked entirely within the runway.

While in the air Pitcairn, the pilot of the P-51 airplane, radio-ed a request to the air traffic control tower for a tractor to meet him and tow the P-51 airplane to the parking area [R. 118, 122]. However, approximately ten minutes had elapsed from the time of the stopping of the P-51 on the runway and the time of the collision between the SBD and P-51 airplanes [R. 77, 132, 135, 142].

Thomas W. Scott, one of the defendants, was operating a Douglas SBD airplane which collided with the P-51 airplane. He was employed by Douglas Aircraft Company to conduct regular production test flights on SBD airplanes. He was conducting such a test flight with the SBD airplane involved in this collision [R. 48, 49, 130, 135].

While Scott was still in the air the operator in the air traffic control tower gave Scott permission to land his SBD airplane [R. 50, 55, 117, 122], and, pursuant thereto, he landed the SBD airplane on runway 25R, coasted down to diagonal runway 22, then turned left into said diagonal runway 22, until he approached a point north of the main runway 25L [R. 49, 51, 52, 123, 124, 136, 138, 142]. Scott held his position there, and watched another airplane take off the main runway 25L [R. 53]. The control tower then gave him permission to cross the main runway 25L [R. 50, 51, 59, 117]. Scott taxied the SBD airplane across the main runway 25L in a hurry [R. 53, 63, 64], and upon entering diagonal runway 22 on the other side of the main runway, he started S-ing (essing) the SBD airplane [R. 53, 54, 133, 136, 138, 142]. Completing his first S turn, he collided with the P-51 airplane parked on the runway [Rep. Tr. p. 51].

Scott testified that he S-ed (essed) so he could see in front of his SBD airplane. He could not remember if he looked all the way down diagonal runway 22, but knew he could see all the way down [R. 53, 54]. He did not remember whether he looked all the way down diagonal runway 22 after stopping at the intersection of the main runway 25L, and the diagonal runway 22 [Rep. Tr. pp. 53, 54]. As Scott taxied down diagonal runway

22 immediately prior to the collision, he could not see directly in front of him because of the nature of the construction of the SBD airplane; the nose was in front of him so that it obstructed his view ahead. However he S-ed (essed) the airplane so that he could get a view of the diagonal runway at alternate intervals [R. 54].

At the time of the accident Scott testified that it was a clear day, but there was a haze [R. 58, 71]. In executing his S turns Scott testified that he turned the SBD airplane first to the left for a distance of twenty-five feet, at an angle of about fifteen degrees from the center, and then to the right about twenty-five feet at about the same angle [R. 64, 66].

The P-51 airplane was painted a brown camouflaged Army color. When Scott landed he was proceeding into the sun. In the direction he was looking there was a background of sand colored or brown hills and black and brown camouflaged buildings. The hills and buildings were at a higher level than the P-51 airplane. The runway was camouflaged with several different colors of paint. The dried grass alongside of the runway where the P-51 airplane was parked was also brown in color [R. 42, 62, 66, 71, 72]. The wingspread was 42 feet on the SBD ship of appellees [Rep. Tr. p. 63].

A minute or two after this collision Scott, the pilot of the SBD airplane, had a conversation with Pitcairn, the pilot of the P-51 airplane. Pitcairn said, "I am glad you cut the switch." After Pitcairn had got off the P-51 airplane, Scott replied: "I am sorry, I didn't see you." Pit-

cairn replied, "I am sorry. I had no business being here. I have been here for about ten minutes. I called for a truck and they haven't come after me yet." [R. 77.]

It was the usual practice and custom to taxi down the center of the runway and Scott was doing that on the day in question [R. 65].

The nose of the SBD Navy plane of appellees was seven or eight feet off the ground and when the pilot was in the pilot's seat he could not look over the front end of the plane and the only way a pilot could look forward was by making "S" turns or fish-tails [R. 65, 66]. The P-51 was lower in height than the SBD [R. 71].

At Los Angeles Municipal Airport it was customary for the control tower operators to notify Scott of obstructions on the runways, and they had quite often done that [R. 71, 72].

The Los Angeles Municipal Airport provided a special parking area for airplanes. It was designated as runway C [R. 60, 71], and also they were parked on the ramp in front of the tower and administration building [See Ex. 1; R. 115]. Pitcairn in his P-51 had been ordered to proceed to this ramp [R. 116]. The tower was aware of the fact he had disobeyed this order and was instead parked on the runway 22 [R. 119, 120-121] when he cleared Mr. Scott across runway A, the main runway, and into the ramp, down the same runway [R. 121] without warning him of the parked P-51 on the runway [R. 101 to 117; Deft. Ex. "C", Transcription of Tower talks with aircraft recorded on a wire transcriber].

POINT I.

The Pilot of Appellee's Airplane Was Not Guilty of Negligence as a Matter of Law in Failing to See the Government Airplane Before the Collision.

The sole questions for determination by the trial court were whether defendant pilot Scott breached his duty of due care to the appellant and whether such breach was the proximate cause of the damage to appellant's airplane.

It is appellee's contention that the defendant pilot, Scott, exercised due care under the circumstances, and that the collision between the SBD airplane and the P-51 airplane was caused solely by the negligence of appellant's agents, Pitcairn, the pilot of appellant's airplane, and its employees in charge of the control tower. That defendant pilot Scott exercised due care under the circumstances is shown by a review of his conduct from the time he requested permission of the control tower to land at the Los Angeles Municipal Airport. When he was over the airfield prior to landing he radioed the control tower, gave them his position, requested and received landing instructions [R. 50, 55, 57, 117, 122]. After he landed on the 25-R runway as instructed, he proceeded to the north of the main runway [R. 50, 51, 59, 123-4, 136, 138, 142]. At the main runway he waited until another plane took off [R. 50-53, 58, 59, 123, 133, 136, 138, 142], and then received permission from the control tower to cross the main runway [R. 50, 51, 59, 117]. He hurried across the main runway to avoid any planes he had not seen because there were many planes around the field at his time [R. 53, 63, 64]. Then he commenced S-ing along runway 22 at fifteen degree angles, until his plane collided with appellant's airplane [R. 54, 64-66]. The

only evidence appellant produced from which negligence might be inferred is that defendant pilot Scott looked out of the cockpit window at the end of each "S" turn down the runway and did not see appellant's airplane parked thereon [R. 54, 67], and that the collision between the two airplanes took place [R. 54, 67, 77].

Considering this matter solely on the issue of negligence of defendant pilot Scott, the question for determination by the trial court was whether there was sufficient evidence to submit the question to the jury, or whether the evidence was so clear that the court could instruct the jury that defendant pilot Scott was guilty of negligence as a matter of law.

The test adopted by both the Federal and State courts in determining when to submit an issue of negligence to the jury is well-stated by the court in *Brinegar v. Green et ux.*, 117 F. (2d) 316, at page 319:

"The determination of the existence of negligence where the evidence is conflicting or the undisputed facts are such that fair-minded men may draw different conclusions from them, is a question of fact for the jury and not one of law for the Court."

Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231;

Champlin Refining Co. v. Walker, 113 F. (2d) 844, 846;

Surdyk v. Indiana Harbor Belt R. Co., 148 F. (2d) 795, 797.

Applying this test to the following facts, it is submitted that fair-minded men may draw different conclusions on the question of whether or not defendant pilot Scott exercised due care under the circumstances:

(a) That defendant pilot Scott radio-ed and received landing instructions from the control tower before landing at Los Angeles Municipal Airport [R. 50, 55, 56, 57, 117, 122];

(b) That defendant pilot Scott was constantly in contact with the control tower requesting and receiving instructions as to where to proceed on the airfield [R. 50, 57-59, 117, 122, 123];

(c) That after receiving said instructions defendant pilot Scott adopted the procedure known as "S-ing" in taxi-ing along runway 22 [R. 53, 54, 64-66];

(d) That defendant pilot Scott carried out this "S-ing" procedure in an orthodox manner [R. 54, 64-66, 133, 136, 138];

(e) That the P-51 airplane was painted a brown Army khaki color which blended with the camouflaged runway, the brown dried grass alongside the runway, and the brown buildings and hills which formed a background in the direction defendant pilot Scott was looking as he landed the SBD airplane [R. 42, 62, 66, 71, 72];

(f) That defendant pilot Scott landed facing the sun [R. 62];

(g) That although the visibility and ceiling were unlimited there was some haze [R. 71].

In the light of these circumstances, especially the blending of the P-51 with the surrounding background it is clearly arguable that the P-51 airplane was invisible to defendant pilot Scott as he taxi-ed along the runway. At least such circumstances create such an uncertainty that reasonable persons could reach different conclusions on the issue of defendant pilot Scott's negligence. If so under the test set forth above it was a question of fact for the jury to decide and not a question of law for the court.

In Point I (A), page 8 of Appellant's Opening Brief, it predicates its appeal upon the doctrine that looking and not seeing something in plain sight constitutes negligence as a matter of law. The basic requirement of the application of this doctrine is that one actually sees the object in plain sight, or that one has a clear, unobstructed view so that he would be negligent in not seeing it.

Lasater v. Oakland Scavenger Co., 71 Cal. App. (2d) 217, 222, 162 Pac. 486;

Busch v. Los Angeles Ry. Co., 178 Cal. 536, 539, 174 Pac. 665;

Nichols v. Nelson, 80 Cal. App. 590, 595, 254 Pac. 648.

This doctrine is inapplicable to the instant case for the following reasons:

1. Defendant pilot Scott did not see appellant's airplane until his SBD airplane collided with it [R. 54, 75, 76, 77];

2. Defendant pilot Scott's view was not unobstructed. He proceeded along the runway by a procedure known as S-ing. (Accepted as a proper procedure for an air-

plane of this construction.) This consisted of traveling in a zig-zag course turning the airplane first to the right and then to the left in 15 degree turns. In this manner defendant pilot Scott had a direct view of the runway *only* at alternate intervals [R. 53, 54, 64, 65, 66];

3. It is arguable that appellant's airplane was not in plain sight of defendant pilot Scott as he proceeded along the runway, because of the following circumstances:

(a) That the P-51B airplane was small, built close to the ground, and painted a camouflage brown color [R. 42, 66];

(b) That the runway on which said collision occurred was painted a camouflage color, known as "Duke's Mixture" [R. 63];

(c) That the area to the right and left of the runway where this collision took place was covered with brown, dried grass [R. 43, 62];

(d) That the hills in the direction that defendant pilot Scott was looking were brown in color and rose over the level of the runway and airfield [R. 62];

(e) That the buildings blending with the hills in the background were black and brown in color [R. 62].

The above circumstances must be considered when determining the issue of negligence, and it is clear that under the test set forth in the *Brinegar* case (*supra*), fair-minded men could reasonably reach different conclusions on the question of whether defendant pilot Scott was negligent in not seeing the appellant's airplane.

In Point I (A), page 11, of Appellant's Opening Brief, appellant cites authorities supporting the principle

that where a person fails to see what is in plain sight and fails to maintain a proper lookout, such conduct is negligent. Appellant does not clearly state whether such conduct is negligence as a matter of law, or merely evidence of negligence from which a jury can determine that the defendant was negligent. As appellant's basic contention on this appeal is that defendant pilot Scott's failure to see appellant's airplane was negligence as a matter of law, these authorities will be considered as to whether they support this contention.

Examination of all of these authorities reveals that in every case the issue of negligence was submitted to the jury as a question of fact rather than the court determining it as a question of law. Appellant has failed to give this court one authority where the court has held that analogous facts to the instant case should have been taken from the jury and decided as a matter of law. Appellee admits that such conduct by defendant pilot Scott is a question of fact to be determined by a jury and feels that the District Court properly submitted this issue to the jury for its determination.

One of appellant's authorities, *White v. Davis*, 103 Cal. App. 531, 284 Pac. 1086, cited in support of the principle that where one fails to see what is in plain sight he is guilty of negligence as a matter of law, is helpful in supporting appellee's theory in that it is arguable whether appellant's airplane blended with the background so as to make it invisible. In the *White* case, plaintiff brought an action against the defendant trucking company for injuries caused by the negligence of its

driver in running into plaintiff while he was fixing a stranded car on the highway. Eyidence showed that plaintiff had stopped his car in front of a stranded Ford car, left his lights on, and had gone back and was working on the Ford car when defendant's truck hit him. The court in commenting on the driver's testimony that he did not see the Ford car or the plaintiff, stated as follows at page 538:

“Whether in the exercise of reasonable care, he should have seen these objects, or whether, in the condition thus created, the Ford was so obscured or so blended with the plaintiff's machine, that it could not be seen by the driver of the truck, in the exercise of reasonable diligence, are questions of fact.”

Although the decision of the trial court was reversed on other grounds, it was affirmed on the question that the issues of negligence and contributory negligence were questions of fact for a jury to decide.

The definition of negligence set forth in Point I (A), page 8, of Appellant's Opening Brief, is an excellent one. However, appellee wishes to point out that although the cases cited thereunder affirm this principle, their facts are not analogous situations supporting appellant's basic contention that the issue of negligence is a question for the court to determine. In the cases of *Terrell v. Key Sytsem*, 69 Cal. App. (2d) 682, 159 P. (2d) 704, and *Toschi v. Christian*, 24 Cal. (2d) 354, 149 P. (2d) 848, the reviewing court reversed the ruling of the trial court granting defendant's motion of nonsuit,

and directed that the issues of negligence and contributory negligence were questions for the jury and not for the court.

In Point I (A), page 12 of Appellant's Opening Brief, it has set forth a quotation allegedly contained in the Court's opinion in *Williams v. Pacific R. R. Co.*, 177 Cal. 235, 170 Pac. 423. A thorough examination of the Court's opinion fails to reveal the language quoted by the appellant.

The other cases, *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 Pac. 175; *Litlerbury v. Kimmet*, 183 Cal. 24, 195 Pac. 660 cited thereunder (App. Op. Br. p. 12), substantiate the principle set forth by Appellant that where the custom and standard of performing a particular act is so well established that any deviation from that standard may be declared negligence or contributory negligence as a matter of law. Both of these cases decided that the trial court properly granted defendant's motion for a non-suit, because plaintiff's conduct was contributory negligence as a matter of law. In the *Chrissinger* case plaintiff's conduct was a complete disregard for his duty to look or listen for an approaching train as he crossed a railroad track. The evidence showed that the train was in plain sight and plaintiff had a clear and unobstructed view along the track. In the *Litlerbury* case the defendant motorist's negligence consisted of making a left hand turn from a thoroughfare into an intersection in front of a bus in which plaintiff was riding, without giving a hand signal.

The trial court instructed the jury that defendant was negligent as a matter of law, and on appeal this ruling was affirmed.

The facts of the *Chrissinger* and the *Litlerbury* cases are clearly distinguishable from the facts before this court. Here, there is no evidence to show that defendant pilot Scott disregarded any well established standard of care as did the parties held responsible in those cases. On the contrary the record shows that defendant pilot Scott was very cautious from the time he first contacted the control tower requesting permission to land. Throughout the entire landing operation he was in constant contact with the control tower and followed its instructions implicitly [R. 50, 55-57]. The mere fact that he did not see Appellant's camouflaged airplane parked on a camouflaged runway and the fact that a collision resulted is surely not sufficient evidence of negligence to bring this case within the rule of these cases.

In *Woodhead v. Wilkinson*, 181 Cal. 599, 185 Pac. 851, the principle of negligence as a matter of law was not even considered by the court. As the case was tried without jury it is impossible to determine whether or not the court would have taken the issue of negligence from a jury. The court held that defendant was negligent in not sounding his horn and in driving negligently on the highway so as to injure plaintiff, a pedestrian, who was rightfully on the highway.

POINT II.

The Appellant Was Guilty of Such Contributory Negligence Which Would Support a Jury Verdict for the Defendant.

Negligence by the plaintiff which contributed to the injury is a defense in an action based upon negligence. This defense has been defined by the California Supreme Court in *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 111 Pac. 530, where the court states at page 519:

“ . . . the contributory negligence which will bar a recovery must be such as to establish that the person by failure to exercise the required amount of care proximately contributed to produce the injury complained of ‘so that but for his concurring and co-operative fault the injury would not have happened’
 . . . ”

See:

Straten v. Spencer, 52 Cal. App. 98, 197 Pac. 540;
and

Restatement of Torts, Secs. 463, 464, 466.

The issue for determination by this Court is whether the District Court erred in overruling plaintiff's motion for an instructed verdict that the appellant was not guilty of contributory negligence. Appellee contends that there is ample evidence to sustain a verdict that plaintiff was guilty of contributory negligence and that the trial court was correct in submitting this case to the jury on the issue of contributory negligence.

The question of when contributory negligence is an issue of fact or an issue of law is, in many instances, a

close one. In *Snipes v. Southern Railroad Company*, 166 Fed. 1, at page 5, the Circuit Court of Appeals, in reversing the action of the District Court in taking the case from the jury, affirmed the language by the Supreme Court of the United States in *Richmond & Danville R. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, which reads as follows:

“It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fairminded men will honestly draw different conclusions from them.”

See:

Surdyk v. Indiana Harbor Belt R. Co., 148 F. (2d) 795, 797;

Dryfoos v. Scavenger Service Corp., 115 F. (2d) 637, 639; and

Malone v. Suburban Transit Co., 64 Fed. Supp. 859, 863, *affd.* 156 F. (2d) 422.

Applying this test to the case at hand on the issue of contributory negligence, and assuming but not admitting, the facts are undisputed, it can clearly be seen that this case is the type upon which “fair-minded men will honestly draw different conclusions from them” as to whether or not the appellant was contributorily negligent.

It is appellee's contention that this record shows ample evidence from which a jury could reasonably find that appellant was guilty of contributory negligence. The following are specific facts of appellant's conduct which substantiate this conclusion:

(a) That Appellant's agent Pitcairn, the pilot of the P-51 airplane, parked it on runway 22 of the Los Angeles Municipal Airport knowing that other airplanes were using said runway for taxi-ing [R. 44, 67, 77];

(b) That Appellant's agent Pitcairn, the pilot of the P-51 airplane, knowingly disobeyed the order of Appellant's agents in charge of the control tower to immediately proceed to the parking place on runway C [R. 77, 116, 118];

(c) That Appellant's agent Pitcairn, the pilot of the P-51, could have parked his airplane just off the runway in the grass which was level, to his right and thus avoided the accident [Tr. pp. 43-77];

(d) That Appellant's agents in charge of the control tower of the Los Angeles Municipal Airport permitted Pitcairn, the pilot of the P-51 airplane, to remain on runway 22 knowing that other airplanes were using said runway, defendant pilot Scott in particular [R. 116, 118-121];

(e) That Appellant's agents in charge of the control tower, knowing that said P-51 airplane was parked on runway 22, and knowing the SBD plane of appellee was so constructed that the pilot could not see forward and knowing the buildings, runway, and the P-51 were camouflaged, and blended with the color of the grass on the air-field, and the surrounding hills, and that the SBD plane

of appellee was headed into the sun, ordered defendant pilot Scott to taxi his SBD airplane along said runway to runway C, the parking area [R. 117-121];

(f) That appellant's agents in charge of the control tower failed to warn the defendant Scott, pilot of the SBD airplane, that the P-51 airplane was parked on runway 22 [R. 117, 118];

(g) The usual custom was to move all airplanes off the runways immediately after their landing but this was not done by Appellant [Tr. p. 42].

(h) That appellant's agents, who were admittedly in charge of the control tower, failed to make sure a tow truck was immediately sent to remove the P-51 airplane from said runway [R. 77, 118, 121].

Even though appellant's contributory negligence consisted only of Pitcairn's conduct in knowingly parking the P-51 airplane on the runway, as described in item (a) and (b) above, it is submitted that such facts would come within the test set forth in the *Snipes* case (*supra*) is such that fair-minded men could honestly draw different conclusions on the issue of contributory negligence by the appellant. That Pitcairn's conduct was lack of due care is substantiated by his own statement to defendant Scott. Defendant Scott testified at page 77 of the Transcript of Record that he had the following conversation with Pitcairn about one or two minutes after the collision (Scott speaking):

"The first thing he said, 'I am glad you cut the switch,' because I was well on the way of cutting him up. And when he finally got out I said, 'I am sorry. I didn't see you.'

“Well, he said, ‘I am sorry. I had no business being here. I have been here for about 10 minutes. I called for a truck and they haven’t come after me yet.’ ” [R. 77.]

In this case the Court had not only Pitcairn’s conduct to consider, but in addition the conduct of the appellant’s agents in charge of the air traffic control tower. (See (d) to (g), inclusive, *supra*.) As they had both the duty and the authority to control the air traffic and ground traffic by airplanes around the airfield [R. 101, 102, 103, 128], it is reasonable to assume that in the proper performance of their duties they, knowing the P-51 airplane was parked thereon, would not have permitted defendant Scott to have proceeded along runway 22. Appellant’s agents had full view of both defendant Scott’s S.B.D. airplane and the P-51 airplane [R. 118, 121] and should have taken precautions to either remove the P-51 airplane or have advised defendant pilot Scott of its presence on said runway. The evidence showed that while in the air, Pitcairn requested a truck to tow the P-51 airplane to the proper parking place [R. 118, 122]. In proper performance of their duties as efficient control tower operators, appellant’s agents should have had said truck there to remove said P-51 airplane when it landed, as it was foreseeable that its presence on runway 22 would create a hazard and cause a collision of the type which resulted.

For these reasons, appellee submits that the trial court would have committed a gross error to remove the case from the jury on the issue of contributory negligence.

On pages 13 and 14 of Appellant’s Opening Brief, it contends that since the test of the P-51 airplane was conducted under the usage and custom in effect at the time

of this collision, that such usage and custom was a proper standard of due care so that upon appellant's compliance therewith its conduct could not be contributory negligence. Appellant confuses the issue of due care with the effect of custom and established procedure. In other words, appellant assumes that habitual course of conduct cannot possibly be a negligent course of conduct. If appellant were correct in this respect then habitual negligence even of an individual, would relieve him of the consequences of his acts. This view is clearly erroneous because the law is clear that a habitual course of conduct must meet the standards of due care as must any other course of conduct.

An authoritative statement by the California Supreme Court affirming this conclusion is contained in *Robinet v. Hawks*, 200 Cal. 265, at page 273 (252 Pac. 1045):

“In the first place the doctrine of customary usage does not, to our knowledge, apply to the question of legal duty under the law of negligence. In *Perry v. Angelus Hospital Assn.*, 172 Cal. 311, 315 we say: ‘We know of no authority for the proposition that by continuing in a careless performance of duty a party transforms its negligence into due care.’”

The *Robinet* case has been affirmed in the following cases:

Sheward v. Virtue, 20 Cal. (2d) 410, 414, 126 P. (2d) 345;

Neel v. Mannings, 19 Cal. (2d) 647, 655, 122 P. (2d) 576;

Milton v. Los Angeles Motor Coach Co., 53 Cal. App. (2d) 566, 570, 128 P. (2d) 178.

On page 14 of Appellant's Opening Brief, it states that there was no duty upon the part of the operators of the

control tower to notify taxiing airplanes of objects on the runway they were using. Surely this is a question for the jury under all the circumstances. Defendant pilot Scott testified it was customary and that on previous occasions when taxiing on the runways he had been warned of airplanes parked thereon [R. 70]. Also Thomas E. Buckles, the operator in charge of the control tower at the time of this collision testified that sometimes the control tower notified the pilots of the taxiing airplanes of obstructions in the runways and sometimes they did not [R. 127]. In the light of such an inconsistent procedure it is surely arguable that the control tower, having complete control of both ground and air traffic, violated its duty of due care in instructing a pilot of an S.B.D. airplane to use a runway on which another airplane was parked without warning the pilot of its presence thereon. If so, it is a question for the jury to decide. This is peculiarly true since appellee's pilot could not see forward in his plane and had only a limited vision by "S" ing and the tower was familiar with this plane.

On page 13 of Appellant's Opening Brief it cites cases affirming the principle that contributory negligence becomes a question of law when the evidence is such that reasonable men can reach only one conclusion. Examination of these cases reveal that they are either distinguishable on their facts from the instant case or are not authority for this principle. Each case will be considered individually as follows:

In *Hamlin v. Pac. Elec. Ry. Co.*, 150 Cal. 776, 89 Pac. 1109, the trial court held that plaintiff's conduct of riding a bicycle along the railroad track of defendant railway company was such a violation of a well-established stand-

ard of due care as to constitute contributory negligence as a matter of law. On appeal, the judgment of the trial court for the defendant was affirmed. Comparing this conduct to that of defendant pilot Scott's in the instant case, it is clear that the situations are not analogous. Defendant pilot Scott was proceeding along the runway where he had a right to be, and where Appellant, in whose charge he was, ordered him to go, whereas, in the *Hamlin* case the plaintiff had no right whatsoever to be on the railroad track.

In *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 Pac. 125, the trial court granted defendant's motion for non-suit on the ground that plaintiff was contributorily negligent in failing to see defendant autoist who was in plain sight as she crossed a street in downtown Los Angeles. On appeal, the Supreme Court reversed this ruling and held that this matter should have been submitted to the jury on the issues of both negligence and contributory negligence. In other words, this case rejects the principle that contributory negligence under such circumstances was a question of law for the Court affirms appellee's contention that it was a question of fact for the jury.

In *Young v. Southern Pac. Co.*, 182 Cal. 369, 190 Pac. 36, the trial court instructed the jury to find plaintiff guilty of contributory negligence as a matter of law. Plaintiff's conduct consisted of attempting to cross the main track of a railroad at a crossing, although his view was obstructed by cars standing on another track, without the slightest effort to stop or look or listen, and without giving any heed to the warning of bells, whistles or shouts of bystanders. Appellee agrees that in such a situation plaintiff would be guilty of contributory negligence as a matter of law. However, the facts in the instant case are

so clearly distinguishable from the *Young* case that appellee feels it is not necessary to comment thereon.

In *Minter v. San Diego Consol. Gas & Elec. Co.*, 180 Cal. 723, 182 Pac. 749, the trial court granted defendant's motion to non-suit the plaintiff on the ground that there was no evidence of negligence by the defendant in the maintenance of insulated electric wires in the upper part of a tree in front of plaintiff's premises. Plaintiff's son was electrocuted while working near the wires in the tree. The Supreme Court affirmed the judgment for the defendant, but rejected defendant's argument that plaintiff was contributorily negligent as a matter of law and commented that the question of plaintiff's negligence would have been properly a question of fact for the jury. Thus, under this authority, appellee's contention would be sustained.

On page 12 of Appellant's Opening Brief it cited *Williams v. Pac. Elec. Railroad Co.*, 177 Cal. 235, 170 Pac. 423, in support of the principle that where the standard of care is so clear that reasonable person could reach only one conclusion on the issue of contributory negligence such issue was for the Court to determine rather than for the jury. This case is authority for appellee's contention in the instant case rather than for appellant's, because the Supreme Court specifically rejected the argument that the conduct of plaintiff constituted contributory negligence as a matter of law and held that such conduct should be submitted to the jury as a question of fact.

On page 16 of Appellant's Opening Brief, it cites several cases as authority for the principle that where but one deduction can be drawn from the evidence the question of proximate cause is one of law only. Appellee agrees with

this principle of law, but contends that it is inapplicable to the facts in the instant case. Here the evidence shows that Appellee's pilot, Pitcairn, knowing runway 22 was used by other airplanes, parked thereon in violation of the custom of keeping the runways clear and in violation of the order of the tower to proceed to the ramp, and rather than moving off the runway to the side or posting himself as a guard to prevent a collision. This conduct could well be construed by a reasonable person as a lack of due care and negligence contributing to this collision. Further, Appellant's agents in the tower, knowing that the P-51 airplane was parked on runway 22, and that the pilot in Appellee's plane could not see forward from it, ordered defendant pilot Scott to taxi the SBD airplane along said runway without warning him of the parked P-51 airplane. Such conduct under all the circumstances is clearly evidence of contributory negligence and was properly submitted to the jury as a question of fact for its determination.

The authorities cited in support of this principle have been examined and are either distinguishable from the instant case on their facts or not authority for the cited principle.

In *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513, the defendant appealed from a judgment for the plaintiff entered pursuant to a jury verdict in his favor. Defendant argued that the trial court erred in not instructing the jury that plaintiff was contributorily negligent as a matter of law. The court affirmed the judgment of the lower court and rejected defendant's argument in the following language at page 241:

“ ‘It is only where no fact is left in doubt, and no deduction or inference other than negligence can be

drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' (Citing cases.)"

On page 16 of Appellant's Opening Brief it has set forth an excellent definition of proximate cause. Applying the facts of the instant case to this definition, it is clear that if appellant's agent, Pitcairn, had refrained from parking on runway 22 when he knew other planes were using it; or if appellant's agents in charge of the control tower had warned defendant pilot Scott of the presence of the P-51 airplane so that he could have avoided colliding with it; or if appellant's agents in charge of the control tower had organized a system whereby the tractor would have been sent to meet the P-51 airplane as soon as Pitcairn requested landing instructions, this collision could have been averted. Thus, under this definition of proximate cause, appellant's conduct could clearly be construed as being a proximate cause of the collision in the instant case. At least it is sufficiently arguable that the issue should be submitted to a jury as a question of fact rather than be determined by the Court as a question of law.

In *Flores v. Fitzgerald*, 204 Cal. 374, 268 Pac. 369, the issue of when contributory negligence is a question of law was discussed, but the Supreme Court held that on the evidence presented the trial court correctly submitted the issue to the jury as a question of fact, and affirmed the lower court's judgment for the plaintiff.

In *Donegan v. Baltimore & N. Y. Ry. Co.*, 165 Fed. 869, the Court affirmed the principle for which it is cited,

but held that on the evidence presented the matter was a question for the jury. It is submitted that this case is not authority for the appellant's contention in the instant case.

In *Winters v. Baltimore & Ohio Ry. Co.*, 177 Fed. 44, 100 C. C. A. 462, the trial court granted the defendant's motion for directed verdict on the ground that the evidence showed plaintiff was guilty of contributory negligence as a matter of law. On appeal, the reviewing court reversed the trial court's ruling, saying that the evidence on the issues of negligence, contributory negligence and proximate cause was such that the trial court erred in not submitting these issues to the jury as a question of fact for its determination.

It is submitted that this authority supports appellee's contention in this matter rather than appellant's.

In *Hales v. Michigan Central Ry. Co.*, 200 Fed. 533, 188 C. C. A. 627, the trial court granted a directed verdict for the defendant on the ground that there was insufficient evidence to go to the jury. On appeal, this ruling was reversed because in the opinion of the reviewing court, the evidence should have been submitted to the jury. Again, this case is not authority for the principle that proximate cause in the instant case should be determined by the Court as a matter of law.

In *San Francisco & P. S. S. Co. v. Carlson*, 161 Fed. 851, 89 C. C. A. 45, the defendant appealed from a jury verdict in favor of the plaintiff and the reviewing court held that the case had been properly submitted to the jury on all issues. Likewise, this case is not an authority for the contention that the issue of proximate cause in the

instant case should have been decided by the Court as a matter of law.

In *Jennings v. Davis*, 187 Fed. 703, 109 C. C. A. 451, the plaintiff, an adjoining landowner, brought action against the defendant, owner of an oil pipe line, for destruction of plaintiff's property. Evidence showed that defendant's pipe line had sprung a leak, causing the oil to seep underneath the plaintiff's property and also that of a blacksmith shop next door. The following morning the blacksmith started a fire in his shop and dropped a piece of red hot iron through the floor boards into the oil which started the fire, destroying plaintiff's building. The trial court refused to instruct the jury that the act of the blacksmith might be an intervening cause so that defendant's conduct would not be the cause of plaintiff's injury. The jury returned a verdict for the plaintiff. On appeal, the reviewing court reversed the ruling of the trial court, holding that the act of the blacksmith was clearly the proximate cause of plaintiff's injury so that judgment should have been for the defendant as a matter of law. Comparing these facts to the instant case, it is clear that they are distinguishable. No where in the instant case is there any conduct which might be construed as an intervening cause. Viewed most strongly against the appellee, the only possible acts of the parties which could have caused this collision were: negligent conduct by defendant pilot Scott; negligent conduct by appellant's pilot, Pitcairn; or negligent conduct by appellant's agents in charge of the control tower. It is submitted that the issue of proximate cause in the instant case is clearly one for the jury to determine, and the trial court correctly submitted this case to the jury on all issues.

POINT III.

The Trial Court Was Correct in Overruling Appellant's Motion for a Directed Verdict, and Its Ruling Should Be Affirmed.

In reviewing the trial court's ruling of refusing to direct a verdict, it is the duty of the reviewing court to view the evidence and all inferences reasonably drawn therefrom in the light most favorable to the plaintiff. Even though this court would disagree with the conclusion reached by the jury in the trial court, it is not within its province to reverse the finding of the jury on that ground.

The scope of the determination of a reviewing court is well-stated in the case of *Champlin Refining Co. v. Walker*, 113 F. (2d) 844, where the Court states at page 846:

“In reviewing the ruling of the lower court on a motion for a directed verdict, the question presented is whether or not there was substantial evidence to sustain a verdict. In determining that question, we must accept as true the evidence favorable to the party against whom a directed verdict has been sought, and he is entitled to the benefit of all favorable inferences that may reasonably be drawn therefrom. If the evidence so considered was such that reasonable men might reach different conclusions, then the case was one for the jury.”

This same conclusion is reached in the following cases:

Surdyk v. Indiana Harbor Belt R. Co., 148 F. (2d) 795, 797; and

Malone v. Suburban Transit Co., 64 F. Supp. 859, 863.

POINT IV.

The Evidence Is Sufficient to Sustain the Verdict of the Jury.

The duty of a reviewing court in considering the question of whether the evidence is insufficient to sustain the verdict of a jury is much different than that of the jurors in reaching such a verdict. The reviewing court is not permitted to weigh the evidence, but can only determine whether there is sufficient evidence from which a jury could reach such a verdict. If there is a sufficient amount of evidence, then the verdict of the jury must be affirmed.

In *Dryfoos v. Scavenger Service Corporation*, 115 F. (2d) 637, the court states the province of the reviewing court in the following language at page 640:

“The law, however, is not an exact science, and its processes cannot always be measured with that certainty which we might desire. We should like to feel morally certain that no wrong is to be done by requiring the payment of damages, but this is not the degree of proof that the law exacts in a civil suit. There is substantial evidence here leading to the conclusion expressed by the jury’s verdict, and under such circumstances our duty is plain. Even though we may disagree with the result reached by the jury we have no right to substitute our judgment for theirs on this question of fact. We are constrained, therefore, to hold that the record presents a jury question on the subject of causal connection.”

See:

Scroggs v. American Stove Co., 142 F. (2d) 297,
299.

Applying the above language to the facts in the instant case, it is submitted that the evidence presented herein both on the issues of negligence and contributory negligence are ample to support the jury's verdict. Therefore, the appellant's appeal on the ground that the evidence is insufficient to sustain the verdict of the jury should be dismissed.

Conclusion.

It is respectfully submitted that there is no basis for appellant's contention that the evidence on either the issue of negligence or that of contributory negligence is such that the trial court could rightfully decide either issue as a matter of law rather than submitting it to the jury as a question of fact. For that reason, appellee contends that the trial court was correct in submitting this case to the jury and in overruling plaintiff's motion for judgment or a new trial. It is respectfully submitted that the judgment of the District Court be sustained.

Respectfully submitted,

JAMES V. BREWER,

Attorney for Appellees.

No. 11759.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT Co., INC., a corporation, and THOMAS
W. SCOTT,

Appellees.

APPELLANT'S REPLY BRIEF.

JAMES M. CARTER,
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No. 11759.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS
W. SCOTT,

Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary to dealing with the two main points discussed in Appellees' Brief, we reiterate, at this time, for purposes of clarity only, our contentions.

We respectfully submit that the evidence on the issue of negligence and that of contributory negligence is such that the Trial Court should not have submitted them to the jury as questions of fact but should have decided them as a matter of law.

I.

**From the Undisputed Evidence, Fair-Minded Men
Could Draw Only One Conclusion—That De-
fendant Scott Was Negligent and His Negligence
Was the Proximate Cause of the Damage to
Plaintiff's Plane.**

The testimony, as reflected in the Statement of Facts of both Appellant's Opening Brief and Appellees' Brief, discloses that the facts surrounding the collision in question are undisputed. This allows appellant to take advantage of the law in *Brinegar v. Green et ux.*, 117 F. (2d) 316, at page 319, cited in Appellees' Brief at page 9. We have no quarrel with the rule set out in that case. In fact we cite it now in support of our contention that the question of negligence was one for the court to decide as a matter of law and not for the jury to decide as a question of fact.

By the test laid down in the *Brinegar* case, the facts here are such that fair-minded men may reasonably draw but one conclusion from them—that Defendant Scott was negligent.

No counsel could seriously deny that the facts are not in dispute. We have only Defendant Scott's version of how the collision occurred, Pitcairn, pilot for the Government plane having died prior to trial.

As we view Defendant Scott's course of conduct, as set out in Appellees' Brief, we notice with interest that bare mention is made of the activities of Scott immediately prior to the collision. Those activities, we respectfully submit, show without doubt clear negligence on Scott's part, and that his negligence was the proximate cause of the plaintiff's damage. His conduct leading up to the runway, careful as he might have been, could not

and do not excuse the lack of due care on the part of Defendant Scott in his subsequent conduct on the runway immediately preceding the accident. This subsequent lack of due care was the cause, without which the collision would not have occurred. His own uncontradicted testimony shows that just before he collided with the Government's plane Defendant Scott looked, but failed to see that which was in plain sight. This is actionable negligence.

Appellees attempt to discredit the application of this basic rule of negligence by saying that the object (plane) was not in plain sight and that Defendant Scott had an obstructed view of same. An examination of Scott's testimony will convince you otherwise. Let us see what the facts show:

Defendant Scott testified that he landed on the main runway 25-R at approximately 2 P. M. on a clear day with good visibility [R. 58, 71] (in fact visibility was good at 300 feet); that he taxied down the diagonal runway making S turns at 15 degree angles in order to see that the way was clear [R. 53, 63, 64]; that at the intersection of 25-L and 25-R he stopped and turned his plane in an easterly direction and stayed there a minute to watch a plane take off [R. 50-53, 58, 89, 123, 133, 136, 138, 142]; that he looked across the main runway 25-L and down 25-R upon which the Government's P-51 plane was parked and crossed the runway in a hurry because the field was busy [R. 53, 63, 64]; that after entering 25-R on which the Government plane was parked, he began to taxi at about 8 to 10 miles per hour [R. 64], and started "S"ing his plane at 15° angles from right to left to see if his way ahead was clear [R. 53, 54, 133, 136, 138, 142]; that he looked but did not see the Government plane [R. 77]. The testimony Defendant Scott gave concerning

what he did after he started "S"ing his plane and up to the time of impact shows his unobstructed view of the Government plane which was in plain sight. See Record, page 54:

"Q. The purpose of the 'S'ing was to get a clear unobstructed view of the diagonal down which you were proceeding. Is that correct? A. (of Scott) That is correct.

Q. And you did that? A. Yes.

Q. And you looked? A. Yes."

Again, at page 53, Scott answered:

"As I turned the plane to the left I could see out the right side. Down the diagonal I could see all the right side."

By Mr. Brewer, at page 66:

"Q. Your only visibility to the front was by 'S' turns, is that it? A. That is correct."

Without further argument it is apparent that by Defendant Scott's own testimony he had an unobstructed view of the Government's plane which was in plain sight, which plane he failed to see. Appellant Scott at no time ever gave any reason for failing to see the Government plane immediately before the collision. Interestingly enough, Defendant Scott testified his right wing hit the fin or tail fin of the Government plane [R. 67], and that the Government plane was parked on the right side of the runway. In view of his further testimony at page 53, that he turned the plane left so he could see out the right side and that he could see all the right side, it is difficult to absolve him from a violation of his duty to see that which was in plain sight. He seeks relief now from answers to scattered questions of his counsel relative to the color of the Government plane and that of the grass,

runway and hills. This testimony cannot avail the Appellees because Defendant Scott many times during the trial admitted seeing, without apparent difficulty, all kinds of planes flown all over the same field, with the same grass, runway, and hills as background [R. 51, 58, 59, 60]; also no one else seemed to have any difficulty in seeing the plane, even at 300 feet.

Actually, if Defendant Scott cares to admit that his failure to see the Government plane was because of its color, those circumstances certainly put an added burden on the defendant to proceed with caution, especially when he knew the field was a busy one on that day.

In addition, it would appear that the Defendant Scott should have foreseen the presence of other planes on the runway and kept a lookout for them. He knew it was a busy field on that day and that other planes were using the diagonal. There was a distinct duty on the part of Defendant Scott under those conditions to keep a lookout for possible danger. See page 63:

“Q. You were asked the question if you were in a hurry to cross the main air strip. Why was that, sir? A. Just in case somebody else might be landing that I didn’t see.”

And again at page 64:

“Q. That was a pretty busy field at that time, was it not? A. Yes.

Q. Lots of planes landing taking off, is that correct? A. That’s right.”

Comment is made by Appellee that in all cases cited by counsel in support of our contention that Defendant Scott was negligent in failing to see what was in plain sight, the question of negligence was submitted to the jury. That is true but in each case the evidence was in dispute. In the instant case there is no dispute as to facts.

II.

Appellant Was Not Guilty of Any Contributory Negligence.

Similar to the question of Defendant Scott's negligence is that of the conduct of Appellant. As hereinabove already pointed out in Paragraph I, it becomes solely a question of law when, as in the instant case, there is no dispute in the evidence, and where, from the undisputed facts, reasonable men can draw but one conclusion.

The facts showing the conduct of the pilot for the Government plant, Pitcairn, before the accident are not in dispute. Because the pilot died before the trial, we must rely entirely upon the testimony of Defendant Scott and the operator of the Air Control Tower for the fact of Pitcairn's conduct. No contradictory evidence was or could be offered.

The only possible way in which Appellees could sustain their claim of contributory negligence on the part of the Government would be to show either that Pitcairn was negligent in parking the Government P-51 on the edge of the diagonal runway or that the operator of the Air Traffic Control Tower was negligent in handling the traffic on the field at the time of the collision.

We respectfully submit that the undisputed testimony discloses not one scintilla of evidence of negligence on the part of either Pitcairn or the operator and reasonable men could not under any reasonable interpretation draw a contrary inference.

Considering now the conduct of Pitcairn directly before the collision, we respectfully point to the following facts:

(A) After conducting a test flight for the Government, and while still in the air, the pilot of the Government's

P-51, Pitcairn, radioed a request to the Air Traffic Control Tower for a tractor to meet him and tow the P-51 to the parking area. [R. 118, 122.]

(B) Pitcairn parked the Government P-51 on the diagonal runway, which is 150 feet wide. [R. 74; Pltf. Ex. 1.]

(C) He parked the plane on the right side of the runway facing West, with both wheels on the edge of the runway. [R. 44, 45, 68-70.]

(D) The plane was parked by Pitcairn as close to the edge as possible.

“It was close to the edge of the runway, his wheels were, as close as he could get, I would say.” [Testimony of Defendant Scott, R. 73.]

(E) It was customary in that airport to park Government P-51 test flight planes on the diagonal runway where Pitcairn parked the Government plane in question. [R. 40.]

(F) In keeping with this there was no rule or regulation prohibiting the parking of planes on runways. [R. 128.]

Most important of all is the testimony of Defendant Scott that Pitcairn parked the Government plane in such a way that 120 feet was left free on the runway to let other planes pass.

“Q. Now the runway is 150 feet wide. How much space would he have been taking up on that runway? A. Not over 30 or 35 feet, I wouldn't think.

Conclusion.

We respectfully submit the evidence on both the issue of negligence and contributory negligence is such that the Trial Court should have decided both rather than submit them to the jury as questions of fact.

For this reason we respectfully submit that the judgment of the District Court be reversed.

Respectfully submitted,

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No. 11760

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNIVERSAL INSURANCE COMPANY,
a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

APR 26 1948

PAUL R. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Portland, Oregon
For Appellant.

GEO. P. WINSLOW,
Tillamook, Oregon and

W. K. PHILLIPS,
Public Service Bldg.,
Portland, Oregon,
For Appellees.

B. G. S. SKULASON,
Public Service Bldg.,
Portland, Oregon,
For 3rd Party Defendant.

In the United States District Court for the
District of Oregon.

Civil No. 3087

FRANCIS M. STEINBACH and CAROLYN S.
STEINBACH,

Plaintiffs,

vs.

UNIVERSAL INSURANCE COMPANY, a
corporation.

Defendant.

COMPLAINT

Plaintiff for cause of action alleges:

I.

That during the times herein mentioned the plaintiffs were the owners of a suction dredge named "WISHRAM."

II.

That the defendant, Universal Insurance Company, is a corporation, organized and existing under the laws of the State of New Jersey, and authorized to write and enter into the contract hereinafter set forth.

III.

That on or about the 6th day of June, 1945 the defendant, for value received, issued its policy of insurance No. P. C. 50295 to plaintiffs wherein and whereby the defendant insured the hull, tackle, apparel, furniture, machinery, boilers, and everything

connected with the said suction dredge Wishram in the sum of \$12,500 against loss cause by stranding, sinking, colliding, and other perils of the sea and water for a period of from the 6th day of June, 1945 to the 6th day of June, 1946.

IV.

That on or about the 14th day of July, 1945 said policy of insurance issued by defendant in favor of plaintiffs was ammended so that the same applied while said dredge was confined to the waters of Nehalem Bay and tributaries of Tillamook County, Oregon. [1*]

V.

That thereafter on or about the 24th day of October, 1945 said policy of insurance was further ammended wherein and whereby the defendant, for value received, agreed to and did extend the terms and protetion, under said policy, to cover one trip and voyage from Nehalem Bay to Tillamook Bay.

VI.

That on or about the 1st day of November, 1945, the said suction dredge Wishram was taken from said Nehalem Bay on a trip and voyage to the said Tillamook Bay; that during said voyage the said dredge Wishram became stranded upon the outer rocks of the jetty leading into the Tillamook Bay and was immediately broken up and demolished by the waves and other elements and became an entire loss.

* Page numbering appearing at foot of page of original certified Transcript of Record.

VII.

That at the time of said loss suction dredge Wishram was reasonably worth considerable in excess of \$12,500.

VIII.

That under the terms of the agreement whereby the defendant extended the terms of said policy of insurance to cover the voyage from Nehalom Bay to Tillamook Bay, plaintiffs were obligated to pay to defendant, in case of loss or damage, the further sum of \$1,062.50, on account of premium, thereby reducing the amount of said insurance and defendant's liability to \$11,437.50.

IX.

That defendant was promptly, fully, and completely notified of said loss and plaintiffs furnished to defendants full and complete information concerning said loss and otherwise complied with all requests of defendant; that defendant on November 30, 1945 notified plaintiffs that it denied all liability for loss under said policy, and, ever since [2] said date, the defendant has refused to take any steps to adjust and pay any part of said loss and has ever since continued to deny all liability for said loss.

Wherefore, plaintiffs demand judgment against the defendant for the sum of \$11,437.50 with interest thereon at the rate of 6% per annum from November 30, 1945, together with the costs and disbursements of this action.

GEO. P. WINSLOW,

Attorney for Plaintiffs.

[Endorsed]: Filed March 30, 1946.

State of Oregon,
County of Tillamook—ss.

1, Carolyn S. Steinbach being first duly sworn,
say that I am one of the plaintiffs in the within en-
titled cause and that foregoing complaint is true as
I verily believe.

/s/ CAROLYNE S. STEINBACH,

Subscribed and sworn before me this 29th day
of March, 1946.

[Seal] /s/ GEO. P. WINSLOW,

Notary Public for Oregon.

My Commission expires May 11, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and for their supple-
mental complaint in the above entitled cause allege
as follows:

I.

Permission of the Court first being had to file
this the plaintiffs' supplemental complaint, the
plaintiffs do by virtue of Rule No. X adopt by ref-
erence each and every allegation, part and parcel of
their complaint heretofore filed in this cause to-
gether with each and every allegation, part and
parcel of the plaintiffs' reply heretofore filed in this

cause and make them a part and parcel of this their supplementary complaint as though particularly set forth and alleged at this place.

II.

That this cause is an action against the defendant, Universal Insurance Company, upon a policy of insurance written by the said insurance company naming the above plaintiffs as insureds and that a loss occurred under the said policy on or about the 1st day of November, 1945. That the defendant was immediately notified of the said loss and did, on the 30th day of November, 1945, deny all liability to these plaintiffs for the said loss under the policy, and ever since said date has refused [4] to settle the said claim or make any adjustment or pay any part or parcel thereof, and have and do now continue to deny liability to these plaintiffs under the said policy for the said loss.

III.

That a period of six months has now expired since the denial of liability to these plaintiffs by the said defendant insurance company and the plaintiffs have been forced to and have employed attorneys for the purpose of collecting their loss and damages under and by virtue of the said insurance policy. That a reasonable attorney's fee to be allowed these plaintiffs as attorney's fees against the defendant in this case is the sum of Two Thousand Two Hundred Eighty-seven and 50/100 (\$2287.50) Dollars.

Wherefore, these plaintiffs demand judgment against the defendant for the full sum of Eleven Thousand Four Hundred Forty-seven and 50/100 (\$11,447.50) Dollars, with interest thereon at the rate of six per cent (6%) per annum from the 30th day of November, 1945, as prayed for in the plaintiffs' complaint herein together with an additional sum of Two Thousand Two Hundred Eighty-seven and 50/100 (\$2287.50) Dollars attorney's fees.

GEO. H. WINSLOW,
W. K. PHILLIPS,
Attorneys for Plaintiffs.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Supplemental Complaint by copy as prescribed by law is hereby admitted, at Portland, Oregon, this 28th day of June, 1946.

MacCORMAC SNOW,
Attorney for Defendant G.K.

[Endorsed]: Filed June 29, 1946.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiffs and for reply to all the

allegations of new matter set forth in defendant's answer and denies each and every allegation therein contained except as the same conform to the express allegations of plaintiffs' complaint or are hereinafter expressly admitted.

Further replying plaintiffs allege:

I.

That prior to the 17th day of October, 1945 the owners of said Suction Dredge "Wishram" applied to defendant for an extension and amendment to said insurance policy, mentioned and referred to in the complaint and answer herein, to cover towage of said Suction Dredge "Wishram" from Nehalem Bay to Tillamook Bay, Tillamook County, Oregon; that defendant agreed to grant said extension and on October 17, 1945, caused the following letter to be written and mailed to the owners' representative:

"Broadway 0523. Addison P. Knapp Co., General Insurance, Henry Building, Portland 4, Oregon.

October 17, 1945.

"Captain Hugh Corrigan,
General Delivery,
Rockaway, Oregon.

"Dear Captain:

"Emmett Rathbun has requested me to give you a quotation for extending the hull insur-

ance policy covering the dredge 'Wishram' while moving from Nehalem Bay to Tillamook Bay.

"Generally speaking the marine underwriters will not cover outside trips of this nature after October 15. However, in view of the sort run I will take the responsibility of granting the coverage at 10 per cent, to return 8½ per cent upon safe arrival; if you will pick the weather and only make the trip when conditions are entirely safe.

"It would of course, be necessary for us to have the dredge surveyed before she leaves Nehalem Bay so if you wish the protection, kindly advise in advance so that necessary arrangements can be made with a qualified surveyor.

"Yours very truly,

/s/ ADDISON P. KNAPP.

"APK:td"

II.

That thereafter said Suction Dredge "Wishram" was placed in condition for towage from Nehalem Bay to Tillamook Bay, a distance of about 11 miles, and was surveyed and inspected by an authorized representative of defendant, namely, Emmett Rathbun; that defendant's surveyor approved the condition of said dredge and authorized and directed that said tow be made as early as possible and during calm weather; said survey and approval of the condition of said dredge "Wishram" was made prior to

October 24, 1945; that thereafter the defendant insurance company submitted to plaintiffs the following statement:

“Portland 4, Oregon,

“Frances M. &Carolyn S. Steinbach,
c/o Captain J. H. Corgan,
General Delivery,
Garibaldi, Ore.

October a/c 1945

“In Account With Addison P. Knapp Co., General Insurance, Henry Building. [8]

“October 24th—Universal Policy PC 50295
—Dredge ‘Wishram.’

“Additional Nehalem to Tillamook. . \$1250.00
To be returned safe arrival, no claim \$1062.50

\$ 187.50”

That thereafter on October 30, 1945 the sum of \$187.50 was paid to defendant by plaintiffs and accepted by defendant to cover the premium charged by defendant for the extended insurance covering the towage from Nehalem Bay to Tillamook Bay.

III.

That on November 1, 1945, when the weather was calm, one Otto Berg, who owned and operated a qualified tow boat, was employed to tow said Suction Dredge “Wishram” from Nehalem Bay to Tillamook Bay; that said dredge was lost on said voyage as alleged in plaintiffs’ complaint.

IV.

That on October 24, 1945, the defendant prepared the following endorsement:

“Endorsement
Suction Dredge ‘Wishram’

“For and in consideration of an additional premium of \$1250 the within policy is hereby extended to cover one trip from Nealem Bay to Tillamook Bay in tow of the tug ‘Umpqua Chief’. In event of safe arrival of the insured dredge at Tillamook Bay and no claim resulting from damage sustained during voyage insured by this endorsement the Assureds shall be entitled to a return of \$1062.50 from the Underwriters.

“After arrival at Tillamook Bay insured dredge shall be warranted confined to the waters of Tillamook Bay and its tributaries.

“All other terms and conditions of this policy remaining unchanged.

“This slip is attached to and forms part of Policy No. PC 50295 of the Universal Insurance Company, Issued to Frances M. and Carolyn S. Steinbach. Dated at October 24, 1945.

ADDISON P. KNAPP CO.
/s/ ADDISON P. KNAPP.”

V.

That said endorsement so prepared by defendant under date of October 24, 1945 was retained by the defendant until October 30, 1945; that on October 30, 1945 the defendant deposited [9] said endorsement in the U. S. mail at Portland, Oregon, addressed to Captain J. H. Corgan, General Delivery, Garibaldi, Oregon; that said endorsement was accompanied by a letter in words and figures as follows, to-wit:

“BRoadway 0523. Addison P. Knapp Co., General Insurance, Henry Building, Portland 4, Oregon.

October 30, 1945.

“Captain J. H. Corgan,
General Delivery,
Garibaldi, Oregon.

“Dear Capt. Corgan:

“In accordance with your recent instructions, we are sending you herewith endorsement applying to Universal Policy PC 50295 extending it to cover one trip of the Dredge ‘Wishram’ while being towed from Nehalem Bay to Tillamook by the tug ‘Umpqua Chief’.

“Surveyor Rathbun has approved this tow only if made during calm weather. Under the circumstances, I trust you will be very careful in picking the weather for the trip.

“Yours very truly,

/s/ ADDISON P. KNAPP.

“APK:td. Encl.”

VI.

That J. H. Corgan, to whom defendant's letter of October 30, 1945 was addressed, is a son of Captain Hugh Corgan; that said son, J. H. Corgan, never had any negotiations with defendant in regard to the extension of said insurance to cover towage of said dredge from Nehalem Bay to Tillamook Bay; that both Captain Hugh Corgan and his son, J. H. Corgan, during the time herein mentioned resided at Rockaway, Oregon, and their postoffice address was General Delivery, Rockaway, Oregon, all of which was well-known to defendant; that Captain Hugh Corgan or his son, J. H. Corgan [10] never did reside at Garibaldi, Oregon and never authorized the sending of any mail to them at Garibaldi, Oregon; that the letter of the defendant to Captain Hugh Corgan under date of October 17, 1945, set forth in full in paragraph I of this reply, contained the correct address of the said Captain Corgan; that the letter of defendant dated October 30, 1945 was sent by defendant to Garibaldi, Oregon, through the sole negligence of defendant and by reason of defendant's said negligence the same was never delivered to the said J. H. Corgan or to anyone else until long after the loss of the said Suction Dredge "Wishram."

VII.

That at no time prior to the loss of said Suction Dredge "Wishram" did the defendant or any of its representatives mention or suggest that the exten-

tion of said insurance to cover said towage from Nehalem Bay to Tillamook Bay was conditioned on the same being towed by the tug "Umpqua Chief"; that in truth and in fact the said tug, "Umpqua Chief" was not then available to make said tow and was engaged in other work more than 300 miles distant from Nehalem Bay, all of which was well known to the defendant and its representatives, or should have been known to defendant and its representatives.

VIII.

That at the time the said Suction Dredge "Wishram" was surveyed and approved by defendant for said voyage from Nehalem Bay to Tillamook Bay, the question of what boat would tow said dredge on said voyage was discussed, and defendant and its representatives were then informed by a representative of the owners of said Suction Dredge "Wishram" that an effort was being made to obtain a certain fish boat known as "Faymar" owned by one Davenport, and that said boat "Faymar" or some other similar boat would be used for said tow; that defendant's representative and surveyor then and there expressed satisfaction [11] with the boat "Faymar" or any other similar boat; that thereafter the owner of said boat "Faymar" notified plaintiffs that he was unable to make said towage and thereupon one Otto Berg, the owner of a fish boat named "Julia D", was employed to tow said dredge; that

the said boat "Julia D" was more powerful and better equipped for towing said dredge than the said boat "Faymar".

IX.

That the payment of the sum of \$187.50 to defendant to cover the premium charged by defendant for extending said insurance as alleged in paragraph II of this reply was made by check; that said check was held by the defendant until November 8, 1945 when the defendant cashed said check; that at the time defendant cashed said check covering said premium, and for several days prior thereto, said defendant had full and complete information about the loss of said dredge "Wishram" and that the same was being towed by the boat "Julia D" at the time of said loss; that defendant retained the proceeds of said check without any offer to return the same until the 30th day of November, 1945.

X.

That had it not been for the negligence of defendant in sending its letters of October 30, 1945, set forth in paragraph V of this reply, to Garibaldi, Oregon, plaintiffs would have received the same on October 31, 1945 and before said voyage was commenced; that on November 1, 1945 defendant was notified of the loss of said dredge "Wishram," and plaintiffs thereupon made demand upon defendant for the payment of the full amount of said insurance; that on November 7, 1945 the defendant for the first time informed plaintiffs that it had prepared an endorsement requiring said tow to be made

by the "Umpqua Chief", and that said endorsement had been mailed to plaintiffs' representative on [12] October 30; that defendant thereupon also informed plaintiffs that said endorsement, through error of the defendant, had been misdirected and sent to Garibaldi, Oregon instead of Rockaway, Oregon; that plaintiffs' representative immediately called at the Post Office in Garibaldi, Oregon and thereupon obtained defendant's letter of date of October 30, 1945, and the endorsement set forth in paragraph IV of this reply.

XI.

That by reason of the facts hereinbefore set forth the defendant ought to be and is estopped from alleging or claiming that there was any condition attached to the extension of said insurance covering the towage of said dredge "Wishram" from Nehalem Bay to Tillamook Bay, requiring that said dredge should be towed by the boat "Umpqua Chief."

XII.

That the provision contained in said endorsement, herein mentioned and set forth in paragraph IV of this reply, requiring said tow to be made by the "Umpqua Chief" was placed in said endorsement without the knowledge or consent of plaintiffs, and plaintiffs had no knowledge or information concerning the same until seven days after the loss of said Dredge "Wishram"; that said provision was placed in said endorsement by the defendant contrary to all

previous negotiations and understandings between plaintiffs and defendant in reference to said voyage; that said provision was placed in said endorsement by defendant through gross error or fraudulently; that the following language contained in said endorsement to-wit, "in tow of the tug 'Umpqua Chief', should be stricken therefrom, and said endorsement should be reformed by striking said language just quoted therefrom.

Wherefore, plaintiffs having fully replied demand judgment against the defendant in accordance with plaintiffs' complaint; [13] plaintiffs also pray that the endorsement set forth in paragraph IV of this reply be reformed by striking out and eliminating therefrom the following language to-wit, "in tow of the tug 'Umpqua Chief'."

Plaintiffs further request that this cause be tried before a jury and demand is hereby made by plaintiffs for a jury trial.

/s/ GEO. P. WINSLOW,

/s/ W. K. PHILLIPS,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 10, 1946.

State of Oregon,
County of Tillamook—ss.

I, Frances M. Steinbach, being first duly sworn, say that I am one of the plaintiffs in the within en-

titled cause and that the foregoing reply is true as I verily believe.

/s/ FRANCES M. STEINBACH.

Subscribed and sworn before be this 5th day of June, 1946.

[Seal]

/s/ GEO. P. WINSLOW,
Notary Public for Oregon.

My Commission Expires May 11, 1947.

Services of the foregoing, by receipt of a duly certified copy thereof, in Multnomah County on this 10th day of June, 1946, is hereby admitted.

/s/ MacCORMAC SNOW,
Attorney for Defendant.

[Endorsed]: Filed June 10, 1946.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes the defendant, leave of the court being first had, and files this its amended answer, and thereupon admits, denies and alleges as follows:

The defendant answering the original complaint herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation of Paragraph I of the complaint.

II.

Admits paragraph II of said complaint.

III.

Admits the allegations of paragraph III of the complaint except that the said policy on June 6, 1945, covered the said dredge only after arrival and while operating at Nehalem Bay, Oregon.

IV.

Answering paragraph IV of said complaint defendant admits that on or about July 14, 1945, the said policy of insurance was amended to cover the said dredge at Nehalem Bay, Oregon, and said amendment provided that from July 23, 1945, said dredge should be warranted confined to the waters of Nehalem Bay and its tributaries, and defendant denies that the said dredge was insured by said policy [16] in the waters or tributaries of Tillamook County, Oregon.

V.

Answering paragraph V of the complaint defendant denies that the said paragraph correctly alleges the amendment to said policy made by the endorsement thereon dated October 24, 1945, and alleges that prior to said date plaintiffs by their agents stated to defendant's agents that they desired the extension of said policy to cover towage of said dredge from Nehalem Bay to Tillamook Bay and represented to defendant's agents that the said towage would be done by the Tug "Umpqua Chief".

The defendant by its agents, being content with the "Umpqua Chief" as the said towing vessel, accepted the said insurance risk on behalf of the defendant, and reinsured a portion of the same on behalf of the defendant on the basis that the said towage of said dredge would be performed by the Tug "Umpqua Chief", and issued and mailed to plaintiffs' agent the said endorsement of October 24, 1945, which is in words and figures as follows:

"Suction Dredge 'Wishram'

Endorsement

For and in consideration of an additional premium of \$1250 the within policy is hereby extended to cover one trip from Nehalem Bay to Tillamook Bay in tow of the tug "Umpqua Chief". In event of safe arrival of the insured dredge at Tillamook Bay and no claim resulting from damage sustained during voyage insured by this endorsement the Assureds shall be entitled to a return of \$1062.50 from the Underwriters.

After arrival at Tillamook Bay insured dredge shall be warranted confined to the waters of Tillamook Bay and its tributaries.

All other terms and conditions of this policy remaining unchanged.

This slip is attached to and forms part of Policy No. PC 50295, of the Universal Insur-

ance Company, issued to Frances M. and Carolyn S. Steinbach, Dated at October 24, 1945.

ADDISON P. KNAPP CO.

By ADDISON P. KNAPP." [17]

VI.

Answering paragraph VI of said complaint defendant admits that on or about November 1, 1945, the said dredge "Wishram" became stranded on the rocks of the jetty at Tillamook Bay and was broken up and demolished and became an entire loss. Defendant alleges that on said day the plaintiffs attempted to have said dredge towed from Nehalem Bay to Tillamook Bay but did not employ the said Tug "Umpqua Chief" to conduct said towage, but employed the fish boat "Julia D" to perform said towage. Defendant further asserts that the said dredge was lost in the said attempted towage by said "Julia D" and that the said "Umpqua Chief" had no part in said towage.

VII.

Answering paragraph VII of said complaint the defendant admits that at the time of said loss the "Wishram" was reasonably worth the sum of \$12,500.00 but denies that the said dredge was worth more than that sum.

VIII.

Answering paragraph VIII of said complaint the defendant denies that the premium arrangements

of said policy were as set forth in said paragraph VIII and alleges that the same were as set forth in the above quoted endorsement of October 24, 1945. At the time of said attempted voyage plaintiffs paid the defendant the sum of \$187.50 on account of said premium. Defendant received the same before learning that said towage from Nehalem Bay to Tillamook Bay was attempted by the fish boat "Julia D" instead of by the tug "Umpqua Chief". Upon learning that the said towage had been attempted by the fish boat "Julia D" the defendant returned the said \$187.50 to the plaintiffs in the form of a check for the reason that because of the breach of warranty by the use of the fish boat "Julia D" instead of the tug "Umpqua Chief", and for other reasons, the defendant was relieved of all liability under the said policy for the said loss of the said dredge. The plaintiffs, however, [18] thereafter returned to defendant the said check for \$187.50 and the defendant has heretofore paid the said sum into the registry of this court for and on behalf of the plaintiffs.

IX.

Answering paragraph IX of said complaint the defendant denies that it was promptly furnished with information that the said towage from Nehalem Bay to Tillamook Bay had been attempted with the aid of the "Julia D" instead of the "Umpqua Chief" and therefore denies each and all allegations of notice contained in said paragraph IX. Defendant further denies that the plaintiffs performed

their duties under said policy in that the plaintiffs having represent and warranted that the towage from Nehalem Bay to Tillamook Bay would be undertaken by the tug "Umpqua Chief" thereafter caused said towage to be undertaken by the said fish boat "Julia D". The defendant therefore denies each and all of the allegations of paragraph IX of said complaint.

The defendant in answer to the Supplemental Complaint herein, admits, denies and alleges as follows:

I.

Answering paragraph I of the Supplemental Complaint the defendant hereby adopts by reference each and all of its admissions and denials in its foregoing answer to the original complaint, and repeats and makes said admissions and denials a part of this, its answer to the Supplemental Complaint.

II.

Answering paragraph II of the Supplemental Complaint defendant admits the allegations of said paragraph II, except that defendant denies that the defendant was immediately or for a considerable period of time notified of the loss therein referred to. [19]

III.

Answering paragraph III of the Supplemental Complaint the defendant admits that six months have expired since the defendant's denial of liability

to the plaintiffs upon the said policy of marine insurance but denies that the plaintiffs have been forced to employ attorneys to bring suit under said policy and denies that the reasonable fee of the plaintiff's attorney in this action amounts to \$2,287.50 or any other sum.

Defendant for answer to the reply of the plaintiffs herein, admits, denies and alleges as follows:

I.

Answering paragraph I of said reply defendant admits that its agent sent a letter to Captain Hugh Corgan at Rockaway, Oregon, dated October 17, 1945, and that the letter set out in paragraph I of said reply is a substantial copy of said letter. Defendant further admits that prior to said time certain negotiations were had with the said Captain Corgan looking toward the issuance of an insurance policy covering the dredge "Wishram" but the defendant does not have sufficient information on which to form a belief as to whom Captain Corgan then represented and therefore denies that he represented the owners of said suction dredge and puts the plaintiffs to the proof of their allegations on that behalf. And the defendant denies each and every other allegation of paragraph I of said reply except as herein expressly admitted. ..

II.

Answering paragraph II of said reply defendant denies that the suction dredge "Wishram" was placed in condition for towage from Nehalem

Bay to Tillamook Bay. Defendant admits that defendant's surveyor approved the condition of the dredge and authorized and directed that the towage be made as early as possible and during calm weather and admits that said survey and approval was made prior to October [20] 24, 1945. Defendant, however, denies that said survey was complete or that said dredge was ever placed in condition for said towage upon the ground that the hawser with which said towage was later attempted was never exhibited to Emmett Rathbun or any other representative of the defendant for seurvey and said Captain Hugh Corgan on behalf of the purported owners of the dredge then represented to the said Emmett Rathbun that the towage from Nehalem Bay to Tillamook Bay would be undertaken by the "Umpqua Chief", using the hawser belonging to the tug "Umpqua Chief", and the said Rathbun being content on behalf of the defendant with the hawser of the "Umpqua Chief" did not survey any hawser on board the "Wishram" and was never shown by the said Captain Corgan or anybody else the hawser on board the dredge "Wishram". Defendant that a bill sent out substantially as stated in said Paragraph II and admits that the sum of \$187.50 was paid to defendant but denies that the same was paid by the plaintiffs and denies that the said payment was accepted by the defendant as a premium for extended insurance from Nehalem Bay to Tillamook Bay or for any other purpose. Defendant denies each and every aallegation of the said paragraph II except as expressly admitted herein.

III.

Answering paragraph III of said reply the defendant admits that the said dredge was lost on an attempted voyage from Nehalem Bay to Tillamook Bay on or about November 1, 1945, but denies that the weather was calm on said day and denies that Otto Berg owned or operated any qualified tow boat. Defendant admits that Captain Corgan or someone on behalf of the purported owners of said dredge employed a boat of which Otto Berg was the purported owners to attempt to tow said dredge "Wishram" from Nehalem Bay to Tillamook Bay but denies that said fish boat was a qualified tow boat or any other kind of a tow boat. Defendant denies each and every allegation of paragraph III of said reply except as specifically admitted herein. [21]

IV.

Answering paragraph IV of said reply admits that the defendant prepared an endorsement to the marine insurance policy which is the subject of this action and that the copy of said endorsement appearing in said paragraph IV is substantially a correct copy thereof but denies that the defendant prepared said endorsement on October 24, 1945, and denies each and every allegation of said paragraph IV except as specifically admitted herein.

V.

Defendant admits that its agents on October 30, 1945, sent the said endorsement in the United States

mail under cover of a letter of that date, a substantially true copy of which is set forth in said reply, but denies each and every other allegation of paragraph V except as expressly admitted herein.

VI.

Answering paragraph VI of said reply the defendant admits that Captain Hugh Corgan has a son by the name of J. H. Corgan and that the said J. H. Corgan never had any negotiations with the defendant in regard to the extension of said insurance to cover towage of said dredge from Nehalem Bay to Tillamook Bay. Defendant denies knowledge and information sufficient to form a belief as to whether Captain Hugh Corgan and the said J. H. Corgan during the time mentioned in said reply resided at Rockaway or elsewhere or that neither of them then resided at Garibaldi, Oregon. Defendant denies that said letter of October 30 was sent by its agent to Garibaldi instead of to Rockaway through any negligence of the defendant and denies knowledge or information sufficient to form a belief as to when the same was delivered to J. H. Corgan or Captain Hugh Corgan. Defendant denies each and every allegation in paragraph VI of said reply except as expressly admitted herein. [22]

VII.

The defendant denies that prior to the loss of the dredge "Wishram" neither the defendant nor any of its representatives suggested that the extension of said insurance policy to cover towage from Neha-

lem Bay to Tillamook Bay was conditioned on the dredge being towed by the tug "Umpqua Chief". Defendant denies that the tug "Umpqua Chief" was not then available to make said towage and denies that said "Umpqua Chief" was more than three hundred miles distant from Nehalem Bay or distant at all from Nehalem Bay but denies that the exact location of the "Umpqua Chief" was known to the defendant or its representatives at any one particular time during the said negotiations. Defendant denies each and every allegation of paragraph VII of said reply except as expressly admitted herein.

VIII.

Answering paragraph VIII of said reply defendant denies that at the time of the alleged survey of the dredge "Wishram", which defendant also denies by reason of the fact that no hawser was surveyed, the said Captain Corgan or anybody on behalf of the purported owners of the "Wishram" stated that a fish boat known as the "Faymar" would be used for said towage and denies that any representative of the defendant at any time approved the "Faymar" or any similar boat. Defendant has no information as to whether the owner of the "Faymar" notified the plaintiffs that he was unable to make said towage or whether the said owner recommended the fish boat "Julia D" and denies the allegations to that effect and puts plaintiffs to the proof thereof, nor does the defendant have any knowledge or information as to whether the "Julia D" or the "Faymar" is the more powerful, and de-

nies the said allegation and puts the plaintiffs to the proof thereof. Defendant denies each and every allegation of paragraph VIII except as expressly admitted herein. [23]

IX.

Answering paragraph IX of said reply, the defendant admits that its agent received the sum of \$187.50, purporting to cover the premium charged by the defendant for extending said insurance, and that defendant cashed the check on or about the time alleged. Defendant admits that on or about November 30, 1945, defendant returned the proceeds of said check to the plaintiffs and that the check of defendant's agent was thereafter returned to the said agent. Defendant has heretofore paid the said sum of \$187.50 into the registry of this court. Defendant denies each and every allegation of said paragraph IX of the reply except as expressly admitted herein.

X.

Answering paragraph X of said reply, defendant denies the alleged negligence of its agent and denies that on November 7, 1945, the defendant for the first time informed the plaintiff that it was prepared an endorsement requiring said towage by the said "Umpqua Chief". Defendant has no knowledge or information as to when anyone purporting to represent the plaintiffs first received said endorsement of October 24, 1945, and therefore denies the allegation of the said paragraph X in that respect. Defendant

denies each and every allegation in paragraph X of said reply except as admitted herein.

XI.

Defendant denies the allegations of paragraph XI of said reply and the whole thereof.

XII.

Answering paragraph XII of said reply defendant has no knowledge or information sufficient to form a belief as to what knowledge or information the plaintiff had if any concerning the requirement that said towage be done by the "Umpqua Chief" and denies the allegations in said paragraph XII in said respect and puts the plaintiffs to the proof thereof. Defendant denies that the said provision was placed in said endorsement contrary to any [24] previous negotiation or understanding between the defendant and the said Captain Hugh Corgan or anyone purporting to represent the plaintiffs. Defendant denies that the said provision was placed in said endorsement either through error, gross or otherwise, or fraudulently. Defendant denies that the words "in tow of the 'Umpqua Chief'" should be stricken from the said endorsement and denies that the said endorsement should be reformed as claimed by the plaintiffs, or otherwise. Defendant denies each and every allegation of said paragraph XII of said reply except as herein expressly admitted.

For a further, separate and affirmative answer to

the said original complaint, supplemental complaint, and reply and to the whole of said three pleadings, the defendant alleges as follows:

I.

During the times named herein, the defendant, Universal Insurance Company, was and is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and was and is duly authorized to transact the business of marine insurance within the State of Oregon.

II.

During the times named herein, J. L. Steinbach and D. E. Steinbach, both residents of Tillamook, within the District of Oregon, were and are partners doing business under the name and style of The Steinbach Iron Works.

III.

On or about the 6th day of June, 1945, one Hugh Corgan, known in the records of this case as Captain Corgan, purchased at a price of \$5500.00 from the United States Government, the suction dredge "Wishram", her machinery, etc., being the dredge named and described in the pleadings of this case. No part of the said purchase price was furnished by the said Captain Hugh Corgan but the said J. L. Steinbach [25] and D. E. Steinbach supplied alone all of the said purchase price to the said Captain Hugh Corgan and in turn borrowed a portion of

the same from the plaintiff, Frances M. Steinbach, wife of the said J. L. Steinbach and D. E. Steinbach, executed and delivered to the said Francis M. Steinbach, their promisory note which was unsecured.

IV.

Upon the purchase of said dredge on or about June 6, 1945, the said Captain Hugh Corgan approached the agents of the defendant insurance company and represented that the plaintiffs herein, Frances M. Steinbach and Carolyn S. Steinbach, were the owners of said dredge and requested the issuance of a marine insurance policy covering the said dredge. Upon said representation the defendant issued its marine insurance policy No. PC-50295, which is the identical insurance policy sued on in this action.

V.

On or about July 23, 1945, the said Captain Hugh Corgan and his son, J. H. Corgan, both giving their post office addresses at Tillamook, Oregon, executed and acknowledged and thereafter filed for record in the County of Tillamook and State of Oregon, an assumed business name certificate representing that said parties had an interest in or intended to conduct the business of Coast Dredging & Construction, Ltd., an estate in joint tenancy under the name and style of Coast Dredging & Construction, Ltd.

VI.

On or about July 23, 1945, the said Captain Hugh Corgan, together with his wife, Constance T. Corgan, executed and acknowledged and thereafter filed for record in the County of Tillamook and State of Oregon, a document whereby the said Hugh Corgan and wife undertook to convey to the said Hugh Corgan and the said J. L. Steinbach and D. E. Steinbach, trustees, certain real property situate in Tillamook County, Oregon, which document stated that the said trustees should conduct a corporate business under the name and style of Coast [26] Dredging & Construction, Ltd., at Tillamook, Oregon. This defendant is informed and believes that the said Captain Hugh Corgan, H. L. Steinbach, D. E. Steinbach and the said J. H. Corgan and no other persons, claim interest in the said business known as Coast Dredging & Construction, Ltd., and that the said business association at all times since July 23, 1945, has been and is in legal effect a partnership.

VII.

The said Captain Hugh Corgan turned over to the said Coast Dredging & Construction, Ltd., the management and operation of the said dredge "Wishram" and may also have turned over the legal ownership of said dredge to the said partnership, Coast Dredging & Construction, Ltd.

VIII.

Wherefore defendant alleges that neither of the

plaintiffs was ever at any time an owner or part owner in all or any part of the suction dredge "Wishram" or her machinery, tackle, apparel, furniture or any part of said dredge and the said marine insurance policy which forms the basis of this suit has at said times been and is now void.

IX.

Upon the issuance of said policy the said Captain Hugh Corgan desired said dredge towed from Coos Bay to Nehalem Bay by the tug "Umpqua Chief" and the defendant believing that said plaintiffs were the owners of said dredge and that the said Captain Hugh Corgan was their agent, consented to said towage and at said time surveyed the tug "Umpqua Chief" and her towing hawser, and also surveyed the said dredge for the said towage.

X.

During the early part of October, 1945, the said Captain Hugh Corgan desired said dredge towed from Nehalem Bay to Tillamook Bay and represented to the agents of the defendant insurance [27] company that he would have said towage performed by the said tug "Umpqua Chief". The agents of the defendants, still believing that the plaintiffs owned said dredge and that Captain Hugh Corgan was their agent and believing that the said towage would be performed by the said "Umpqua Chief", issued an endorsement covering said towage from Nehalem Bay to Tillamook Bay, which endorsement is cor-

rectly set forth in paragraph V of this answer and by reference is incorporated in this present paragraph. Before issuing said endorsement the defendant's agent surveyed the said dredge as to her general fitness for said towage but made no survey of the tug "Umpqua Chief" or her towing hawser. At the time of the said survey of the said dredge "Wishram", the said dredge was not equipped with any hawser, nor had said dredge ever been equipped with a towing hawser so far as the defendant and its agents know or were informed by the said Captain Hugh Corgan, or anyone in charge of the said dredge.

XI.

Some two weeks or thereabouts before the said towage was attempted from Nehalem Bay to Tillamook Bay, the said Captain Hugh Corgan on behalf of said dredge, entered into an agreement to make said towage with one Otto Berg, Jr., who was the owner's representative on board and in charge of a certain fish boat known as the "Julia D", whereby the said "Julia D" was to undertake said towage. Thereafter and until the day of the said attempted towage from Nehalem Bay to Tillamook Bay, the said Captain Hugh Corgan knew that said towage was to be attempted by said fish boat but failed to disclose that fact to the defendant, or any of its agents or representatives.

XII.

In order to assist in said towage and since the fish

boat "Julia D" was not equipped with a towing hawser, the said Captain Hugh Corgan borrowed from some person unknown to this defendant a hawser for the purpose of use in said planned towage from Nehalem Bay to [28] Tillamook Bay. The said hawser was old and badly worn and rotted and was in no sense a sufficient hawser for use in said towage and these facts were at all times known to the said Captain Hugh Corgan or should have been known by him.

XIII.

The said "Julia D" was not at said time and never was a sufficient vessel for use in towing said dredge from Nehalem Bay to Tillamook Bay, in that the said "Julia D" was not sufficiently powered and was not equipped with proper towing bits or a sufficient crew. Nor was said "Julia D" equipped with any sufficient or strong towing hawser. All of the said facts about the deficiencies of the "Julia D" were at all times known to the said Captain Hugh Corgan, or should have been known by him.

XIV.

The said Captain Hugh Corgan having previously represented that the tug "Umpqua Chief" would effect the said towage from Nehalem Bay to Tillamook Bay, never informed the defendant or any of its agents or representatives, that he would attempt to have said towage made by the fish boat "Julia D" and failed to disclose to the defendant or its agents that the said towage would be made by the said "Julia D" and that he had borrowed an old worn

out hawser for the purpose of making said towage. If these facts had been known by or noticed to the defendant or any of its agents prior to the time of the issuance of said endorsement of October 24, 1945, the defendant would have refused to issue said endorsement and would have refused to insure said dredge on the proposed towage from Nehalem Bay to Tillamook Bay by the said "Julia D" with said defective hawser.

XV.

The defendant and its agents believing in the truth of the representations by Captain Hugh Corgan that the said towage from Nehalem Bay to Tillamook Bay would be conducted by the tug "Umpqua Chief", issued its said endorsement of October 24, 1945, naming said [29] "Umpqua Chief" as the towing tug and reinsured its risk on said towage with various other marine insurance companies. If the plaintiffs were permitted a recovery in this case on said policy notwithstanding that said towage was attempted by said "Julia D", the defendant will be unable to recover from its said reinsuring companies any part or portion of said loss.

XVI.

At the time of said attempted towage of the dredge "Wishram" from Nehalem Bay to Tillamook Bay, the said dredge "Wishram" was equipped with said borrowed hawser and the said hawser was insufficient for the purposes of said tow-

age and the said fact was fully known or should have been known to the said Captain Hugh Corgan. Consequently the said dredge was then and there unseaworthy and said unseaworthiness was within the knowledge or privity of the owner or owners of said dredge.

Wherefore defendant prays that the said marine insurance policy and the endorsement thereof of October 24, 1945, be held void and cancelled and that the plaintiffs take nothing by their complaint and supplemental complaint and reply herein and that the defendant have and recover of and from the plaintiffs its costs and disbursements and that the defendant have such other further relief as may be just and equitable in the premises.

MacCORMAC SNOW,
Attorney for Defendant.

Service of the within amended answer is admitted this 8th day of July, 1946.

/s/ W. K. PHILLIPS,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed July 8, 1946. [30]

In the District Court of the United States
For the District of Oregon
No. Civil 3087

FRANCES M. STEINBACH and
CAROLYN S. STEINBACH,
Plaintiffs,

vs.

UNIVERSAL INSURANCE COMPANY,
a corporation,
Defendant,

UNIVERSAL INSURANCE COMPANY,
a corporation,
Third Party Plaintiff,

OTTO BERG and OTTO BERG, Jr.,
Third Party Defendants.

PETITION TO BRING IN THIRD PARTY

Comes the Universal Insurance Company, defendant and third party plaintiff above named, and respectfully petitions the above entitled Honorable Court and thereupon shows as follows:

I.

This petitioner herewith lodges with the clerk of the above entitled court his third party complaint which he desires to file against the third party defendants above named, and by this reference incorporates in this petition each and all of the allegations of the said third party complaint and thereby makes said allegations and each of them a part of this petition.

II.

In and by said third party complaint, your petitioner exhibits a state of facts under which Otto Berg and Otto Berg Jr., above named third party defendants, who are not yet parties to this action, are or may be liable to your petitioner or to the plaintiffs herein, and either of them, for the amount of the plaintiffs' claim against [31] your petitioner.

Wherefore your petitioner respectfully prays as follows:

(1) That your petitioner be permitted to file herein its said third party complaint;

(2) That process may issue by the clerk under said third party complaint against Otto Berg and Otto Berg Jr., third party defendants above named, requiring them to appear herein within the time required by the rules of this court, then and there to answer the exigencies of the complaint and reply herein and of the third party complaint herein;

(3) That upon a hearing of this cause if the court shall adjudge your petitioner to be liable to the plaintiffs and either of them for any or all of the amount named in the complaint herein, then and in that event that your petitioner may have judgment over against the third party defendants, and each and either of them, for such amount or amounts as your petitioner may be adjudicated liable to the plaintiffs or either of them;

(4) That your petitioner may have such other

and further relief in the premises as may be just and equitable.

MacCORMAC SNOW,
Attorney for Universal Insurance Company,
Petitioner, also Defendant and Third Party
Plaintiff.

To the Plaintiffs and to Wendell K. Phillips and
George P. Winslow, their attorneys.

Please be notified that the defendant will bring
the within petition on for hearing Monday, July 22,
1946, at 10:00 a.m., or as soon thereafter as counsel
can be heard.

MacCORMAC SNOW,
Attorney for Defendant.

Service of the within petition is admitted this
8th day of July, 1946.

/s/ W. K. PHILLIPS,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed July 8, 1946. [32]

[Title of District Court and Cause.]

ORDER

This cause coming on to be heard on the petition
of the defendant for leave to file its Third Party
Complaint against the third party defendants, the
plaintiffs appearing by their attorney and consent-
ing thereto, and it further appearing that the de-

fendant has lodged with the clerk of this court its proposed Third Party Complaint against the third party defendants, from which complain and the said petition it appears that the third party defendants and each or either of them may be liable to the plaintiffs herein or to the defendant for the damage and loss alleged in the complaint herein.

Now therefore, it is considered and ordered that the defendant shall be and is hereby granted leave to file the said Third Party Complaint and the clerk of this court shall be and is directed to issue summons thereon.

Dated July 8, 1946.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed July 8, 1946. [33]

[Title of District Court and Cause.]

APPLICATION TO REOPEN

Comes the defendant and respectfully requests the Court to reopen this case for the purpose of receiving expert testimony as to the sufficiency of the hawser, a piece of which is in evidence herein for the purpose of the towage involved herein.

The ground of this application is as follows:

Defendant believes that virtually any well-informed marine surveyor or tugboat operator ac-

quainted with the weather, waters and harbors of the Oregon coast would consider this hawser insufficient for the purposes of the towage in question.

Defendant attaches hereto the affidavits of Orth Mathiot and K. A. Webb.

The evidence is undisputed as to these facts:

Hugh Corgan proposed to Otto Berg, Jr., that the latter tow the dredge. They agreed on the towage and the price therefor subject to the securing of a hawser by Corgan. Corgan said he would undertake to get a hawser. Through Ole Johnson, Corgan got "permission" to enter the Coast Guard boat house. J. H. Corgan and dredge engineer, Orville Boster went in the boat house and upstairs to the loft, and there selected the hawser in question among several. They then drove to the home of Otto Berg, Jr. and told him about the hawser. Berg drove to his moorage and moved the *Julia D* alongside the boat house. J. H. Corgan and Boster returned to the loft and payed the hawser out of the window and down to the deck of the *Julia D*, where Berg received and coiled it.

The fact that Berg could have refused to use this hawser does not negative the fact that the dredge employees selected and delivered it on board the *Julia D* for the express purpose of use in the contemplated towage. Thus it is undisputed that the Wishram voluntarily furnished the hawser.

If the defendant can satisfy the Court that the hawser was insufficient for this towage, it follows that the dredge was unseaworthy at the commence-

ment of the voyage, within the privity of its owners and operators.

/s/ MacCORMAC SNOW,
Attorney for Defendant.

Service of the within application is admitted this
23rd day of June 1947.

/s/ W. K. PHILLIPS,
Of Attorneys for Plaintiffs.

/s/ B. G. SQULASON,
Of Attorneys for Third Party
Defendants. [36]

Affidavit

United States of America,
District of Oregon—ss.

I, Orth Mathiot, being first duly sworn depose and say that I am experienced in towage on the Oregon coast and with the harbors thereof; that I have examined a piece of hawser in evidence in the case involving the loss of the dredge Wishram, and am of the opinion that the said hawser was insufficient for the towage of said dredge from Nehalem Bay to Tillamook Bay on November first of any average year; that I will so testify if examined as a witness in said case.

ORTH MATHIOT.

Subscribed and sworn to before me this 23rd day of June, 1947.

[Seal] MacCORMAC SNOW,
Notary Public for Oregon.
My commission expires September 27, 1948.

Affidavit

United States of America,
District of Oregon—ss.

I, K. A. Webb, being first duly sworn, depose and say that I am a marine surveyor for the Board of Marine Underwriters; that I have examined the piece of the hawser in evidence in the suit involving the loss of the dredge Wishram and am of the opinion that the said hawser was insufficient for the towage of the dredge from Nehalem Bay to Tillamook Bay on November first of an average year; that I will so testify if placed on the witness stand.

K. A. WEBB.

Subscribed and sworn to before me this 23rd day of June, 1947.

[Seal] MacCORMAC SNOW,
Notary Public for Oregon.
My commission expires September 27, 1948.

[Endorsed]: Filed June 23, 1947. [38]

[Title of District Court and Cause.]

ORDER DENYING APPLICATION
TO REOPEN

This cause came on to be heard at 11:00 o'clock a.m., June 23, 1947, prior to the entry of findings of fact and conclusions of law and the judgment herein on the application of the defendant to reopen

this case for the purpose of receiving expert testimony as to the sufficiency of the hawser, a piece of which is in evidence herein for the purpose of the towage involved herein; the plaintiffs appearing by W. K. Phillips, one of their attorneys, the defendant appearing by MacCormac Snow, his attorney, and the third party defendant appearing by B. G. Skulason, their attorney; and the Court having heard the parties in respect to said application,

Now, therefore the said application is denied upon the grounds stated by the court at the above described time.

June 23, 1947.

CLAUDE McCOLLOCH,
Judge.

Docketed June 24, 1947.

[Endorsed]: Filed June 24, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause having come on regularly on the 17th and 18th days of June, 1947, for trial of all issues other than those reserved for further trial and decision, as hereinafter stated, before the Honorable Claude McCulloch, judge of the above entitled court in Portland, Oregon, sitting without

a jury, the parties having respectively waived the right to insist upon jury trial; the plaintiffs appearing in person and by and through their attorneys, Geo. P. Winslow and W. K. Phillips, and defendant appearing by its representatives and by MacCormac Snow, its attorney, and the third party defendants appearing in person and by B. G. Skulason, their attorney; and the Court having separated the claims and cause for trial, and having advised counsel for the [39] respective parties that the issues between the plaintiffs and the defendant Universal Insurance Company, a corporation, would be tried separately at that time without trial of the issues between Universal Insurance Company, a corporation, as third party plaintiff, and Otto Berg and Otto Berg, Jr., third party defendants, and all parties being advised as to what issues were to be tried, opening statements were made by respective counsel, after which testimony was introduced on behalf of the plaintiffs, followed by testimony on behalf of the defendant, and finally concluded by rebuttal testimony on behalf of the plaintiffs, and respective counsel for the plaintiffs and the defendant, Universal Insurance Company, having made oral argument of the cause to the Court, and at the outgoing of the Court on Wednesday, the 18th day of June, 1947, the Court took the said cause under advisement, and the Court, having given full and due consideration to the said cause and now being duly advised, does now make the following

caused by sinking and other perils, for a period beginning the 6th day of June, 1945, and ending the 6th day of June, 1946, and that the said policy at all times herein mentioned was in full force and effect.

IV.

That on or about the 24th day of October, 1945, the said policy of insurance was amended, wherein and whereby the defendant, for an agreed additional premium of the sum of \$1250.00, \$1062.50 thereof to be returned on safe arrival with no claim, did insure and extend the said policy to cover one trip and voyage from Nehalem Bay to Tillamook Bay for the full sum of \$12,500.00, which was the reasonable value of the said suction dredge "Wishram."

V.

That the defendant did receive a check from the said plaintiffs in the sum of \$187.50, which it cashed and retained the funds received therefrom until on or about the 30th day of November, 1945, when it attempted to return the same to the plaintiffs, which return was refused, and that thereafter, on the 21st day of May, 1946, the defendant did pay the said \$187.50 and deposit the same in the registry of this court. [41]

VI.

That on or about the 17th day of October, 1945, the said suction dredge "Wishram" was surveyed by a representative of the defendant and declared to be seaworthy.

VII.

That on or about the 1st day of November, 1945, the said suction dredge "Wishram" was wrecked and became a total loss in Tillamook Bay, Oregon.

VIII.

That the said suction dredge "Wishram" was seaworthy at the commencement of the said voyage.

IX.

That it has not been established that the plaintiffs or their agents failed to disclose any material facts to the defendant, in violation of the terms of the said insurance policy, or that in obtaining the said extension and amendment of the said policy permitting the said voyage from Nehalem Bay to Tillamook Bay, the plaintiffs or their agents made any false representations or violated any warranties to this defendant.

X.

That the plaintiffs did on or about the 5th day of November, 1945, fully and completely notify the defendant of the said loss, and give to the defendant complete information concerning the loss of the suction dredge "Wishram."

XI.

That thereafter, and on or about the 30th day of November, 1945, the defendant did, by letter, deny liability to the plaintiffs on the said policy, on the

ground that the said [42] tow of the said suction dredge "Wishram" from Nehalem Bay to Tillamook Bay was not made by the tug "Umpqua Chief," and refused and ever since said time has refused to pay to these plaintiffs the sum of \$11,437.50 or any other amount.

XII.

That at all times herein mentioned said policy of insurance made and executed by this defendant to these plaintiffs was in full force and effect and enforceable, and that the terms thereof have not been violated by the plaintiffs.

XIII.

That the amount in controversy between the plaintiffs and the defendant, due under the said insurance policy, is the sum of \$11,437.50, together with interest thereon at the rate of six per cent per annum from the 30th day of November, 1945.

XIV.

That a reasonable attorney fee to be allowed by this Court to the plaintiffs, as attorneys' fees in this action, is the sum of \$1500.00.

XV.

That the defendant is the owner of the said \$187.50 deposited by it in the registry of this court.

XVI.

That the issues between the third party plaintiff, Universal Insurance Company, a corporation, and the third party defendants, Otto Berg and Otto Berg, Jr., were not presented to this Court for determination and are subject to further proceedings.

Now, therefore, based on the foregoing Findings of [43] Fact, the Court now draws the following

Conclusions of Law

That the defendant is and has been indebted to these plaintiffs in the full sum of \$11,437.50, together with interest thereon at the rate of six per cent per annum from the 30th day of November, 1945, until paid.

II.

That the plaintiffs are entitled to recover off of and from the defendant, Universal Insurance Company, a corporation, the full sum of \$11,437.50, together with interest thereon at the rate of six per cent per annum from the 30th day of November, 1945, until paid, and their costs and disbursements herein incurred.

III.

That the plaintiffs are entitled to recover off of and from the defendant, Universal Insurance Company, a corporation, attorneys' fees in the sum of \$1500.00.

That the plaintiffs are entitled to judgment against the defendant, and judgment shall forthwith and immediately be entered in favor of the plaintiffs and against the defendant in the full sum of \$11,437.50, together with interest thereon at the rate of six per cent per annum from the 30th day of November, 1945, until paid, and for the additional sum of \$1500.00, attorneys' fees, together with plaintiff's costs and disbursements herein incurred.

Dated this 23rd day of June, 1947.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 23, 1947. [44]

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Findings of Fact and Conclusions of Law by copy as prescribed by law is hereby admitted, at Portland, Oregon, this 20th day of June, 1947.

MacCORMAC SNOW,
By FEN

Attorney for Defendant. [45]

In the District Court of the United States
For the District of Oregon

Civil No. 3087

FRANCIS M. STEINBACH and
CAROLYN S. STEINBACH,

Plaintiffs,

vs.

UNIVERSAL INSURANCE COMPANY,
a corporation,

Defendant,

UNIVERSAL INSURANCE COMPANY,
a corporation,

Third Party Plaintiff,

OTTO BERG and OTTO BERG, Jr.,

Third Party Defendants.

JUDGMENT

The above-entitled cause having come on regularly on the 17th and 18th days of June, 1947, for trial before the Honorable Claude McColloch, judge of the above-entitled court in Portland, Oregon, sitting without a jury, the parties having respectively waived the right to insist upon jury trial; the plaintiffs appearing in person and by and through their attorneys, Geo. P. Winslow and W. K. Phillips, and defendant appearing by its representatives and by MacCormac Snow, its attorney, and the third party defendants appearing in person and by B. G.

Skulason, their attorney; and the Court having separated the claims and causes for trial, and having advised counsel for the respective parties that the issues between the plaintiffs and the defendant Universal Insurance Company, a [46] corporation, would be tried separately at that time without trial of the issues between Universal Insurance Company, a corporation, as third party plaintiff, and Otto Berg and Otto Berg, Jr., third party defendants, and all parties being advised as to what issues were to be tried; the Court having heard the evidence and considered the exhibits, having listened to argument of the respective attorneys and having taken the same under advisement, and having heretofore made and filed its Findings of Fact and Conclusions of Law wherein the Court finds and concludes that plaintiffs are entitled to recover judgment off of and from the defendant, Universal Insurance Company, a corporation, in the full sum of \$11,437.50, together with interest thereon at the rate of six per cent per annum from the 30th day of November, 1945, until paid, and for the additional sum of \$1500.00 attorneys' fees, together with plaintiffs' costs and disbursements herein incurred;

Now, therefore, it is ordered and adjudged that the plaintiffs, Francis M. Steinbach and Carolyn S. Steinbach, have and recover off of and from the defendant, Universal Insurance Company, a corporation, the full sum of \$11,437.50, together with interest thereon at the rate of six per cent per annum from the 30th day of November, 1945, until

paid, and the further sum of \$1500.00, attorneys' fees, together with their costs and disbursements herein incurred taxed at \$117.40.

Dated this 23rd day of June, 1947.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 23, 1947. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Universal Insurance Company, defendant above named and gives this notice that the said defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in and by the above-entitled court in the above-entitled cause on the 23rd day of June 1947 in favor of the plaintiffs above named and against this appealing defendant and from the whole of said judgment.

/s/ MacCORMAC SNOW,
Attorney for Universal Insurance
Company, Defendant-Appellant.

[Endorsed]: Filed August 12, 1947. [48]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Be it remembered that we, Universal Insurance Company, Defendant and Appellant above named, and Glens Fall Indemnity Company, a New York Corporation, are held and firmly bound unto whom it may concern in the full penal sum of Fifteen Thousand Dollars (\$15,000) for the payment of which well and truly to be made we and each of us do hereby bind ourselves and our successors and assigns, jointly and severally, firmly by these presents.

Dated this 15th day of August 1947.

The condition of this obligation is such that if the said Universal Insurance Company, Appellant, shall satisfy in full that certain judgment executed June 23, 1947 together with costs, interests, and damages for delay if for any reason the appeal taken herein by said Appellant is dismissed or if the judgment appealed from is affirmed and shall satisfy in full such modifications of the said judgment and such costs, interest, and damages as the Appellate Court may adjudge and [49] award, then this obligation shall be null and void otherwise to be and remain in full force and effect.

In witness whereof we have caused these presents to be duly executed the day and year above set forth.

UNIVERSAL INSURANCE
COMPANY,

Jewett Barton Leavy and Kern,

By /s/ ADDISON KNAPP,

Its Agent.

[Seal]

GLENS FALLS INDEMNITY
COMPANY,

By /s/ J. STUART LEAVY.

Countersigned:

JEWETT, BARTON, LEAVY
and KERN,

By /s/ J. STUART LEAVY,

Resident Agents.

Service of the within Supersedeas Bond is admitted this 2nd day of Sept. 1947 and exceptions are hereby waived to the amount of the bond and the surety.

/s/ W. K. PHILLIPS,

Of Attorneys for Plaintiffs-
Respondents.

/s/ G. G. SKULASON,

Attorney for Third Party
Defendants-Respondents.

Approved Sept. 8, 1947.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed September 8, 1947. [50]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes the appellant and files this statement of the point on which he intends to rely on this appeal.

The District Court erred:

1. In admitting parol evidence as tending to show transfer of the dredge.

2. In finding as a fact that the plaintiffs are proper parties to insure the dredge.

3. In failing to hold that plaintiffs were never the owners of the dredge.

4. In failing to hold that the plaintiffs had no insurable interest in the dredge.

5. In failing to hold the policy sued on void for want of insurable interest in the plaintiffs.

6. In failing to hold the plaintiffs failed to prove the allegation of their complaint that plaintiffs were the owners of the dredge.

7. In entering findings of fact and conclusions of law and judgment at variance with the complaint in that plaintiffs allege that they owned the dredge and the trial courts decision is that plaintiffs are proper parties to sue on the policy. [51]

8. In allowing a recovery by plaintiffs upon a showing that they were not the real parties in interest in the recovery.

9. In failing to hold that the dredge was unseaworthy at the commencement of the voyage in that the dredge was equipped with an insufficient towing hawser.

10. In failing to deny recovery to the plaintiffs on account of breach of an implied warranty of the policy insurance that the dredge should be seaworthy at the commencement of the voyage.

11. In holding that the insufficiency of the hawser with which the towage was attempted was not chargeable to the operators of the dredge.

/s/ MacCORMAC SNOW,
Attorney for Appellant.

Service of the within Statement of Points is admitted this 2nd day of Sept., 1947.

/s/ W. K. PHILLIPS,
Attorney for Plaintiffs-
Respondents.

/s/ B. G. SKULASON,
Attorney for Third Party
Defendants-Respondents.

[Endorsed]: Filed September 8, 1947. [52]

[Title of District Court and Cause.]

STIPULATION WITH REFERENCE TO EXHIBITS

It is hereby stipulated that a pre-trial conference was held at which a number of exhibits were identified and given pre-trial numbers; that no pre-trial order was entered and the case was thereafter tried on the pleadings; that in the course of the trial all

pre-trial exhibits were offered and received in evidence, identified by their respective pre-trial numbers, including all exhibits to depositions.

Defendant does not waive its objection and exception to the admission of parol testimony tending to prove any transfer of the dredge "Wishram."

Third party defendants do not hereby waive any objections they may have to the introduction in evidence of any or all of said exhibits.

/s/ GEO. P. WINSLOW,
/s/ W. K. PHILLIPS,
Attorneys for Plaintiffs.

/s/ MacCORMAC SNOW,
Attorney for Defendant.

/s/ B. G. SKULASON,
Attorney for Third Party
Defendants.

[Endorsed]: Filed September 8, 1947. [53]

[Title of District Court and Cause.]

DESIGNATION

Comes the appellant and designates the portions of the record, proceedings and evidence in the District Court to be contained in the record on appeal, as follows:

1. Complaint
2. Supplemental complaint

3. Reply
4. Amended answer
5. Petition to bring in third parties
6. Order granting leave to file third party complaint
7. Application to reopen.
8. Findings of fact and conclusions of law
9. Judgment
10. Transcript of proceedings June 17, 18, 23, 1947
11. Pre-trial Exhibit 7, Tillamook depositions and exhibits
12. Pre-trial Exhibit 13, Letter—Steinbach to Corgan
13. Pre-trial Exhibit 14, assumed name, Steinbachs
14. Pre-trial Exhibit 15, Conveyance and Trust
15. Pre-trial Exhibit 20, Piece of Hawser [55]
16. Pre-trial Exhibit 21, Letter—War Department to Corgan
17. Pre-trial Exhibit 22, Letter—War Department to Corgan
18. Pre-trial Exhibit 23, Policy
19. Pre-trial Exhibit 24, A, B and C Indorsements
20. Notice of Appeal
21. Supersedeas Bond
22. Statement of Points on Appeal
23. This Designation
24. Stipulation in re Exhibits

- 25. Stipulation in re insurance policy
- 26. All blotter entries

/s/ MacCORMAC SNOW,
Attorney for Appellant.

Service of the foregoing Designation is hereby
accepted this 2nd day of Sept. 1947.

/s/ W. K. PHILLIPS,
Attorney for Respondents, Francis M. Steinbach
and Carolyn S. Steinbach.

/s/ B. G. SKULASON,
Attorney for Third Party
Defendants & Respondents.

[Endorsed]: Filed Sept. 8, 1947. [56]

[Title of District Court and Cause.]

STIPULATION WITH REFERENCE TO THE POLICY

It is stipulated with respect to the policy of insurance forming the subject of this action (Exhibit 23) that the dredge "Wishram" was lost by reason of one or more of the marine perils named in the policy and that the only portions of the policy material to the issues raised by the appeal of this cause, other than those quoted in the pleadings, are as follows:

"Universal Insurance Company, New Jersey, A Stock Company. Talbot, Bird & Company, Inc., General Managers, 114 Sansome Street, San Francisco, California, by this policy of insurance does insure Francis M. Steinbach and Carolyn S. Stein-

bach for account of themselves, loss, if any, payable in funds current in the United States to assures, or order. [59]

In consideration of the said person or persons effecting this policy promising to pay to the said company the sum of three hundred seventy-five and no/100 dollars as a premium at and after the rate of 3 per cent for such Insurance the said Company takes upon itself the burden of such Insurance to the amount of twelve thousand five hundred and no/100 dollars and promises and agrees with the Insured, there Executors and Administrators in all respects truly to perform and fulfill the Contract contained in this Policy. And it is hereby agreed and declared that the said Insurance shall be and is an Insurance upon hull, machinery, etc., of and in the good Suction Dredge called the "Wishram" or by whatsoever other name or names the said vessel is or shall be named or called, lost or not lost, at and from the 6th day of June 1945 until the 6th day of June 19 beginning and ending with noon, Pacific Standard Time.

The said vessel, etc., for so much as concerns the Insured, by agreement between the Insured and the said Company in this Policy, are and shall be valued at as follows:

Hull, tackle, apparel, furniture, etc.....	\$.....
Machinery, boilers, etc., and everything	
connected therewith	\$.....

\$12,500.00

Twelve thousand five hundred and no/100 dollars

subject to the terms and conditions of this form and clauses hereto attached."

American Hulls (Pacific)

1944

To be attached to and form a part of Policy No. PC50295 of the Universal Insurance Company, dated June 6, [60] 1945, Francis M. Steinbach and Carolyn S. Steinbach for account of themselves but subject to the provisions of this policy with respect to change of ownership.

Should the vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter or requisition; provided, however, that in the case of an involuntary transfer by requisition or otherwise, without the prior execution of any written agreement by the Assured, such cancellation shall take place fifteen days after such transfer; and provided further that if the vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such cancellation shall be suspended until arrival at final port of discharge if with cargo or at port of destination if in ballast. This insurance shall not inure to the benefit of any such charterer or transferee of the vessel, and if a loss payable hereunder should occur during such period of fifteen days the Underwriters shall be subrogated to all the rights of the Assured against the transferee, by reason by such transfer,

in respect to all or part of such loss as is recoverable from the transferee and in the proportion which the respective amounts insured bear to the insured value. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale, transfer, charter or requisition shall apply even in the case of insurance "for account of [61] whom it may concern."

Loss, if any, payable to assureds or order. In the sum of twelve thousand five hundred and no/100 dollars, at and from the 6th day of June 1945 beginning and ending with noon to the 6th day of June 1946 Pacific Standard Time.

Provided, however, should the vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

On the Suction Dredge called the "Wishram" (or by whatsoever name or names the said vessel is or shall be called.)

The said vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

Hull, tackle, apparel, passenger fittings, equipment, stores, ordnance, munitions, boats and other furniture.....\$	
Boilers, machinery, refrigerating machinery and insulation, and everything connected therewith.....	\$12,500.00

Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be a part of the hull and not of the machinery.

The Underwriters to be paid in consideration of this insurance three hundred seventy-five and no/100 dollars being at the rate of 3 per cent.

Special Conditions and Warranties

Warranted laid up and out of commission in Coos Bay, Oregon. [62]

For and in consideration of an additional premium of \$1250.00, the within policy is hereby extended to cover the insured dredge at and from Coos Bay to Nehalem Bay, it being understood and agreed that the underwriters will refund \$1062.50 of this additional premium if and when dredge arrives safely at Nehalem Bay.

After arrival at Nehalem Bay this policy shall cover the insured dredge while laid up or while operating at rate to be arranged.

“The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being waived, except provisions required by law to be inserted in the Policy.”

This stipulation may be printed in the transcript in lieu of said policy.

/s/ GEO. P. WINSLOW,
/s/ W. K. PHILLIPS,
Of Attorneys for Plaintiffs.

/s/ MacCORMAC SNOW,
Attorney for Defendant.

/s/ B. G. SKULASON,
Attorney for Third Party
Defendants.

Filed October 9, 1947. [63]

DOCKET ENTRIES

1946

Mar. 30—Filed complaint.

Mar. 30—Issued summons—to marshal.

Apr. 3—Filed summons with return.

Apr. 17—Filed motion of deft. for summary judgment.

Apr. 23—Filed motion of ptff. for extension of time to file counter affidavits and continuing hearing on motion for summary judgment.

Apr. 23—Filed affidavit of W. K. Phillips.

Apr. 23—Filed and entered order allowing ptff. to May 4 to file counter-affidavits and continuing hearing on motion of deft. for summary judgment to May 13, 1946. Fee

1946

May 6—Filed affidavit.

May 13—Filed and entered order denying motion for summary judgment and allowing deft. to May 23, 1946 to plead. Fee

May 21—Issued subpoena and one copy to MacCormac Snow.

May 21—Filed answer.

May 28—Filed subpoena.

June 8—Filed motion of deft. for issuance of subpoenas duces tecum.

June 10—Filed and entered order for issuance of subpoenas duces tecum. McC.

June 10—Filed reply and demand for jury.

June 11—Filed notice of taking deposition.

June 11—Issued 2 subpoenas duces tecum to MacCormac Snow.

June 12—Filed motion for issuance of subpoena duces tecum to Capt. Hugh Corgan.

June 12—Filed and entered order for issuance of subpoena duces tecum to Capt. Hugh Corgan. McC.

June 12—Issued subpoena duces tecum to MacCormac Snow.

June 24—Entered order allowing ptff. 2 weeks to file amended complaint and deft. 10 days thereafter to plead. Fee

June 29—Filed supplemental complaint.

July 8—Filed amended answer of deft. to original complaint, and supp. complaint.

July 8—Filed petition of defendant to bring in third party.

1946

- July 8—Filed and entered order granting leave to deft. as third party plaintiff to file complaint and for process. Fee
- July 8—Filed third party complaint.
- July 9—Issued third party summons to marshal.
- July 10—Filed deposition of Hugh Corgan in behalf of deft.
- July 23—Filed summons, with marshal's return.
- Aug. 1—Filed separate answer of third party deft. Otto Berg, Jr.
- Aug. 1—Filed separate answer of Otto Berg.
- Sept. 21—Entered order setting for trial on Oct. 2, 1946. McC
- Sept. 25—Filed Notice of Deft. and Third Party Ptff. take deposition of J. H. Corgan.
- Sept. 24—Entered order striking trial date. Attorneys notified McC. [65]
- Oct. 10—Filed notice of taking deposition of George N. Williams.
- Oct. 14—Filed amended answer to Otto Berg, Jr., Third Party defendant.
- Oct. 14—Filed motion of Otto Berg re deposition of Geo. N. Williams only on written interrogatories.
- Oct. 14—Entered order setting hearing on motion for interrogatories for Oct. 15, 1946—10 a.m. McC.

1946

- Oct. 18—Entered record of hearing on motion for interrogatories—order taking under advisement. McC.
- Oct. 30—Filed deposition of George N. Williams.
- Nov. 8—Filed deposition of Otto Berg.
- Nov. 12—Entered order setting for pre-trial on Jan. 6, 1947. McC.
- Dec. 16—Filed Notice, deposition Herbert P. Lederer.
- Dec. 17—Filed Amended Notice Deposition Herbert P. Lederer.
- Dec. 31—Filed and entered Order for subpoena duces tecum to Col. O. E. Walsh. McC.
- Dec. 31—Issued subpoena duces tecum — to marshal.
- Dec. 31—Filed application for subpoena duces tecum to Col. O. E. Walsh.

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- Jan. 2—Filed def't's. notice to produce.
- Jan. 2—Filed application for subpoena duces tecum.
- Jan. 2—Filed and entered order for subpoena duces tecum. McC.
- Jan. 2—Issued subpoena duces tecum and 3 copies to MacCormac Snow.
- Jan. 6—Record of pre-trial hearing. Holcomb Rep. McC.
- Jan. 3—Filed subpoena duces tecum.
- Jan. 15—Filed Transcript of Proceedings Jan. 6, 1947. on 2/24/47.

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- Feb. 19—Filed notice of taking deposition of Col. O. E. Walsh. McC.
- Feb. 19—Filed application for subpoena duces tecum.
- Feb. 19—Filed and entered order for issuance of subpoena duces tecum to Col. O. E. Walsh. McC.
- Feb. 19—Issued subpoena duces tecum—to F. Wagner.
- Apr. 2—Entered order setting for trial on June 3, 1947. Notified McC.
- Apr. 8—Entered order relating to exhibit 34(a). McC.
- Apr. 8—Filed notice, deposition of Rex Davenport.
- May 15—Entered order resetting for trial on June 17, 1947. Notified McC.
- June 2—Filed deft's. motion to postpone trial.
- June 2—Filed deft's. affidavit in support of above motion.
- June 2—Entered order setting for pre-trial conference on June 9, 1947. Notices. McC.
- June 9—Record of pre-trial conference and order denying motion of Third party deft. for continuance of trial date and that trial date stand subject to later arrangements. McC.
- June 11—Issued civil subpoena and 4 copies to MacCormac Snow.
- June 17—Entered record of trial before court. McC

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- June 18—Entered record of trial before court and order to submit authorities. McC.
- June 23—Filed application to reopen case for further testimony and evidence.
- June 23—Entered order denying motion to reopen case. McC.
- June 24—Filed above order.
- June 23—Filed and entered Findings of Fact and Conclusions of Law. McC.
- June 23—Filed and entered Judgment for ptff. for \$11,437.50 with int. at 6% from Nov. 30, 1945 and for \$1500.00 atty. fees notices. McC.
- June 26—Entered Judgment in Lien Docket.
- Aug. 12—Filed notice of appeal by Universal Insurance Co. Snow.
- Aug. 12—Copies of notice of appeal to Atty. Winslow, Tillamook, and Atty. Phillips, Pub. Ser. Bldg., Portland.
- Sept. 8—Filed statement of points.
- Sept. 8—Filed stipulation re exhibits.
- Sept. 8—Filed designation of record.
- Sept. 8—Filed supersedeas bond. [66]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered

from 1 to 67 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3087, in which Universal Insurance Company, a corporation is defendant and appellant and Francis M. Steinbach and Carolyn S. Steinbach are plaintiffs and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of proceedings dated June 17, 18 and 23, 1947 and original exhibits 7, 13, 14, 15, 20, 21, 22, 23, 24 A, B, and C, 25, 26 A, B, and C, 27 A and B, 28, 29, 30, 31, 32, 33, 34 A and B, 35, 37, and 39. Exhibit 20 is being sent under separate cover.

I further certify that the cost of comparing and certifying the within transcript is \$47.90 and that the same has been paid by appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 15th day of October, 1947.

[Seal] LOWELL MUNDORFF,

Clerk.

By /s/ E. NOWELL,

Deputy. [67]

In the District Court of the United States
For the District of Oregon

Civil No. 3087

FRANCIS M. STEINBACH and CAROLYN S.
STEINBACH,

Plaintiffs,

vs.

UNIVERSAL INSURANCE COMPANY, a cor-
poration,

Defendant.

UNIVERSAL INSURANCE COMPANY, a cor-
poration,

Third-Party Plaintiff,

vs.

OTTO BERG and OTTO BERG, Jr.,

Third-Party Defendants.

Portland, Oregon, June 17, 1947

Before: Honorable Claude McColloch, Judge.

Appearances:

Mr. George P. Winslow and Mr. Wendell K.
Phillips, Attorneys for Plaintiffs;

Mr. MacCormac Snow, Attorney for Defendant
and Third-Party Plaintiff;

Mr. Bardi G. Skulason, Attorney for Third-Party
Defendants. [1*]

* Page numbering appearing at top of page of Reporter's certified
Transcript of Record.

PROCEEDINGS OF TRIAL

(Opening statements were then made by respective counsel.)

Mr. Phillips: I might suggest, your Honor, that there has been a pre-trial and all the exhibits, I believe, are already in. I suggest that we offer them at one time and that either party may use them as they see fit, if there is no objection.

Mr. Snow: No objection. Your Honor, there is one exhibit I did not have at that time. I neglected to reserve a number for it. I ask the Court at this time to have it marked as a pre-trial exhibit and admitted with the other exhibits. I refer to the bill of sale by Otto Berg to C. F. Youngblood regarding the Gas Screw Vessel *Julia D.*

Mr. Phillips: We have no objection to that.

Mr. Snow: A certified copy.

Mr. Skulason: In that connection, your Honor, if you are going to use the pre-trial procedure and if all the exhibits should be in, I would like to have introduced as a part of the pre-trial procedure certain checks covering, in part, the purchase price of the *Julia D.*, checks signed by the defendant Otto Berg, Jr., payable to the other defendant, his father. I have them here and I think counsel for the insurance company saw them at the time the depositions were taken. [2]

The Court: During the recess, the Court Reporter will give those additional exhibits numbers to follow the numbers already issued, and all exhibits will be considered offered and admitted as

trial exhibits, taking the same numbers as the pre-trial exhibits, subject to any objections that might have been stated at the pre-trial and any further objections that may be stated at any time in this trial.

Mr. Skulason: Your Honor, these checks may be marked as one exhibit?

The Court: We will mark them after a while.

Mr. Skulason: Yes, your Honor.

Mr. Winslow: In connection with the exhibits, your Honor, at the pre-trial I did not have the exhibit marked, because it is admitted and stated in the pleadings, but, in order to have the exhibits in chronological order, I think this should be marked. It is the statement to the plaintiffs for the premium charged. It is set forth in the reply and is admitted.

Mr. Snow: No objection. I am not sure as to the status of the depositions which have heretofore been taken in this case.

The Court: Some lawyers like to introduce them and some do not. If you want to give them exhibit numbers, that may be done.

Mr. Snow: I wish to reserve for the record objection to certain testimony adduced on cross examination of these witnesses, [3] which would tend to show parol transfer of the Wishram to the ladies, and I wish to reserve in the record an objection to any and all testimony tending to show transfer of the dredge in any other manner than as required by the statutes of Oregon.

The Court: It is so understood.

Mr. Phillips: As I understand, the exhibits are all in evidence and will be marked as numbered in the pre-trial.

The Court: Yes.

The following exhibits, heretofore marked at pre-trial conference, were thereupon received in evidence:

DEFENDANT UNIVERSAL INSURANCE COMPANY'S
EXHIBITS

Defendant's Exhibit No.	Description
1	Document showing specifications of Umpqua Chief and Julia D.
2	Letter dated September 26, 1946, United States Department of Commerce, Weather Bureau.
3	Photostat copy of instructions for airway meteorological service.
4	Photostatic copy of instruction for airway meteorological service.
5	Surface weather observations, October 17, 1945, to November 8, 1945.
6	Deposition of Hugh Corgan, taken on behalf of defendant, May 29, 1946.
7	Depositions of Hugh Corgan, Frances M. Steinbach, Carolyn S. Steinbach, David E. Steinbach, John Steinbach and Wendell Charles Wilson, taken on behalf of defendant at Tillamook, Oregon, June 17, 1946, together with exhibits attached thereto marked 7(1), 7(2-a to e), 7(3), 7(4), 7(5), 7(6), 7(7), 7(8), 7(9), 7(10), 7(11), 7(12), 7(13) and 7(14).

Defendant's
Exhibit No.

Description

[Attached exhibits 3, 4, 11 and 14 are set out in Transcript of Record as follows:

No. 7(3) on page 219 No. 7(11) on page 224
No. 7(4) on page 223 No. 7(14) on page 224]

- 8 Depositions of Otto Berg and Otto Berg, Jr., Third Party Defendants, taken on behalf of Third Party Plaintiff October 17, 1946—with exhibits attached.
- 9 Deposition of George N. Williams, taken on behalf of Defendant and Third Party Plaintiff, San Luis Obispo, California, October 24, 1946.
- 10 (Reserved for deposition of Herbert P. Lederer.)
- 11 (Reserved for deposition of Rex Davenport.)
- 12 (Reserved for deposition of Ed Fisk.)
- 13 Copy of letter dated Tillamook, Oregon, May 31, 1945, addressed to J. H. Corgan and signed J. L. Steinbach.
[Set out on page 225 in Transcript of Record.]
- 14 Certified copy of Certificate of Assumed Business Name, Steinbach Iron Works.
[Set out on page 226 in Transcript of Record.]
- 15 Certified copy of Agreement and Conveyance, Coast Dredging & Construction, Ltd.
- 16 (Reserved for log pages, Umpqua Chief.)
- 17 U. S. Coast and Geodetic Survey Map, Entrance to Tillamook Bay.
- 18 U. S. Engineers Blue Print No. TM-1-128, Entrance to Tillamook Bay.
- 19 (Reserved for Inventory of Wishram.)
- 20 (Reserved for piece of hawser in possession of Wendell Wyatt.)

Defendant's

Exhibit No.

Description

- 20½ Check dated November 30, 1945, payable to Frances M. Steinbach and Carolyn S. Steinbach, \$187.50, signed Addison P. Knapp Co.

PLAINTIFFS' EXHIBITS

Plaintiffs'

Exhibit No.

Description

- 21 Letter dated May 25, 1945, addressed to Captain Hugh Corgan, from Office of District Engineer.

[Set out on page 228 in Transcript of Record.]

- 22 Letter dated June 6, 1945, Office of District Engineer addressed to Captain Hugh Corgan.

[Set out on page 229 in Transcript of Record.]

- 23 Policy No. PC50295, Universal Insurance Company.

- 24-A Statement covering additional Premium on Policy PC50295, \$571.76.

- 24-B Endorsement to Policy, etc.

- 24-C Letter dated July 18, 1945, Addison P. Knapp Co. to Captain Hugh Corgan.

- 25 Letter dated October 17, 1945, Addison P. Knapp Co. to "Captain Hugh Corrigan," Rockaway, Oregon.

[Set out on page 230 in Transcript of Record.]

- 26-A } Envelope from Addison P. Knapp Co. addressed
26-B } to Captain J. H. Corgan, Garibaldi, Oregon, post-
26-C } marked October 3, 1945; letter dated October 30,
1945, Addison P. Knapp Co. to Captain J. H. Corgan, Garibaldi, Oregon; and endorsement dated October 24, 1945, issued by Universal Insurance Company for Policy PC50295 issued to Frances M. and Carolyn S. Steinbach.

[Set out on pages 231-232 in Transcript of Record.]

Plaintiffs'
Exhibit No.

Description

- 27-A } Envelope marked from Addison P. Knapp Co.,
27-B } Portland, Oregon, addressed to Mrs. Frances M. Steinbach and Mrs. Carolyn S. Steinbach, Tillamook, Oregon, postmarked November 30, 1945, and letter on letterhead of Addison P. Knapp Co. addressed to Frances M. Steinbach and Carolyn S. Steinbach and signed by Addison P. Knapp Co., dated November 30, 1945.

[Set out on page 233 in Transcript of Record.]

- 28 Copy of letter dated December 13, 1945, addressed to Addison P. Knapp Co., Portland 4, Oregon (written by Frank Lonergan, attorney representing plaintiffs).

[Set out on page 235 in Transcript of Record.]

- 29 Letter dated December 27, 1945, to Honorable Frank J. Lonergan, signed by MacCormac Snow.

[Set out on page 236 in Transcript of Record.]

- 30 Account Book, First National Bank of Portland, Tillamook Branch, No. 5384, Frances M. Steinbach, showing deposits commencing June 3, 1944, and ending April 6, 1946.

- 31 Check dated June 6, 1945, payable to First National Bank of Portland, Tillamook Branch, in amount \$675.60, signed Frances M. Steinbach.

[Set out on page 238 in Transcript of Record.]

- 32 Check dated June 25, 1945, payable to Addison Knapp & Co., in amount \$1,250, signed Frances M. Steinbach.

[Set out on page 239 in Transcript of Record.]

- 33 Check dated October 30, 1945, payable to Addison P. Knapp Co., in amount \$187.50, signed Coast Dredging & Construction, Ltd., J. H. Corgan.

[Set out on page 240 in Transcript of Record.]

Plaintiffs'

Exhibit No.	Description
34-A }	Envelope addressed to "Jimmy Corregon," Rockaway, Oregon, postmarked October 19, 1945, and letter, undated, addressed to "Jimmy Corrigan," Rockaway, Oregon, and signed by Rex Davenport. [Set out on page 241 in Transcript of Record.]
34-B }	
35	Copy of Coast Guard Log, under date of November 1, 1945.

DEFENDANT'S EXHIBIT

Exhibit No.	Description
36	Bill of Sale of licensed vessel under 20 tons, Otto Berg to C. F. Youngblood, Depoe Bay, Oregon, covering Julia D.

PLAINTIFFS' EXHIBITS

Exhibit No.	Description
37	Statement, Addison P. Knapp Co. to Frances M. and Carolyn S. Steinbach, dated October 24, covering Universal Policy PC50295, Dredge Wishram. [Set out on page 242 in Transcript of Record.]

THIRD PARTY DEFENDANTS' EXHIBIT

Exhibit No.	Description
38	Sixteen checks drawn on Tillamook Branch, The First National Bank of Portland, payable to Otto Berg and signed by Otto Berg, Jr.

* * * * *

JOHN L. STEINBACH

was thereupon produced as a witness on behalf of plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

Q. Your name is John L. Steinbach?

A. Yes.

Q. Where do you live, Mr. Steinbach?

A. Tillamook.

Q. How long have you lived in that territory?

A. Thirty-four years.

Q. What has been your principal business during that time? A. Operating a machine shop.

Q. Have you, in your work, had experience in boat building and dealing with boats?

A. Yes.

Q. Just briefly, what has been the experience?

A. In 1918 I was in partnership with a man by the name of Phinney and we had a contract with the United States Shipping Board and we constructed one type of hull.

Q. How large a boat was that?

A. 300 feet long. In 1943 we had a contract with the United States Maritime Commission to build three 65-foot tugs which were delivered to the British Government, and we did general boat repair. We are right on the waterfront and have been [14] doing general boat repair for years.

(Testimony of John L. Steinbach.)

Q. About when did you become acquainted with the Dredge Wishram?

A. During 1943 I made two calls on the Army Engineers at the Pittock Block here in Portland, trying to get a small dredge in Tillamook Bay to dredge the basin in front of the outfitting dock so when our boats were launched——

Q. I don't think we will go into that so much at this time, Mr. Steinbach. In the year 1945 just briefly tell the Court whether or not you were notified the Wishram was being offered for sale?

A. Yes, we received an invitation to bid on her in 1945.

Q. At that time what was your relationship with Captain Hugh Corgan?

A. Well, we had known Mr. Corgan for many years, had business dealings with him, and we contacted him at the time we contemplated making a bid on this dredge, and we entered into a tentative agreement between my brother and Corgan and myself that if the dredge was purchased we would form a company, a dredge company, and engage in the dredge business, dredging business, and each to have a one-third interest. Mr. Corgan was not able to advance any of the money, but he would take a working interest and pay it out as the dredge paid out.

Q. I am handing you Plaintiffs' Exhibit O. Did you see that letter shortly after it was written? [15]

Mr. Snow: Pardon me, your Honor. I haven't had any notation of Plaintiffs' Exhibit O. Are you giving this a special number?

(Testimony of John L. Steinbach.)

Mr. Winslow: It may be 24.

A. 21, I believe it is. Isn't it 21?

Q. All right.

Mr. Snow: Plaintiffs' Exhibit No. 21.

Q. (By Mr. Winslow): Yes, 21.

A. Yes, I saw this.

Q. The Captain Hugh Corgan there named in the letter, whom was he acting for at that time?

A. He was acting for the Steinbachs.

Q. What was done after you received that letter in regard to raising the money to pay the purchase price of the Dredge Wishram?

A. Well, we——

Q. I don't care to go to much into detail, but was the money raised?

A. Yes, the money was raised.

Q. Who contributed the money that went to pay for the Wishram?

A. My brother and I, I believe in the neighborhood of \$3800, and then we borrowed \$3825. I believe that was the amount—and we borrowed from my wife \$1675 and that would make \$5500.

Q. Your wife is the plaintiff Frances Steinbach?

A. That is right. [16]

Q. What was done with that money?

A. My wife and I came into Portland together and we purchased a certified check or draft and Mr. Corgan and I went up to the Army Engineers office together, and Mr. Corgan handed them the check and the letter from the Army Engineers accepting the check to Captain Corgan was handed

(Testimony of John L. Steinbach.)

to him and he turned right around and handed it to me.

Q. I am handing you Plaintiff's Exhibit No. 22. Is that the letter which you say the Army Engineers gave to Captain Corgan? A. It is.

Q. Had Captain Corgan or anyone else, except the Steinbachs, contributed anything to the purchase price of the Dredge? A. No.

Q. Prior to the purchase of the dredge, or at the time of the purchase of the dredge, was there any discussion between the Steinbachs as to who was to hold title to the dredge Wishram?

A. There was.

Q. Go ahead and give it.

Mr. Snow: At this point, your Honor, I desire to enter an objection to any and all testimony which might tend to prove parol title to this dredge. on the ground that the Oregon statute provides, and on the further ground that from time immemorial the transfer of boats and vessel have been and are made by bills of sale. It is not customary or lawful to [17] transfer a vessel by parol and especially under the Oregon statute it is not a lawful transfer. What this family might have agreed upon among themselves about Captain Corgan's boat would not be binding on this insurance company.

The Court: He may answer, subject to the objection.

(Pending question read.)

A. We had received an invitation to bid on this

(Testimony of John L. Steinbach.)

dredge, I think, some time in March or April, and we had not received our settlement from the Maritime Commission on these tugs. We had contemplated a purchase for several years, when the sale came up, and we had not received this settlement, and, so, we were not in a position to bid on the dredge at the time and we did not offer a bid.

Q. (By Mr. Winslow): My question is as to the discussion between you Steinbachs.

A. I am trying to lead up to it.

Q. Make it as brief as possible.

A. I was trying to lead up to how it came about.

Mr. Snow: May I have a continuing objection to all this testimony, to testimony of this character, your Honor?

The Court: It may be understood.

A. Shortly after the bids were opened, we received a letter from the Army Engineers asking us to offer a private bid. Previous to this, we had made a tentative agreement on the matter, in case we did purchase a dredge, so, after we received [18] this letter from the Army Engineers, requesting us to make a private bid, my wife and I came up to Portland and met with Mr. Corgan at his home, and he expressed regret that we had not gone ahead with it, for several reasons. He wanted to get back in the dredging business and also make a place for his son who was coming out of the service.

Going home that night, we talked it over in the car and my wife said, "John, I like the idea of Corgan—like the idea that Corgan has of making

(Testimony of John L. Steinbach.)

this business available for his son," and we had a son in the service and my brother had two. She said, "If you haven't enough money—if you and Dave cannot raise enough money between you, I have some money that I have saved from teaching and I will loan you some."

Q. Was your wife teaching school then?

A. Well, yes, she was teaching. She was a teacher when we were married and when our oldest son started to college she went back to teaching school.

We had not received our settlement from the Maritime Commission. They held us up for two years and two months before we got a final settlement, so we owed some bills on these boats and, in order to avoid any complications, we agreed among ourselves—we did not put it in writing—that we would take on this dredge and the insurance and any other papers would be made out in the wives' names and be held that [19] way until such time as we had our dredging company organized and had it in operation.

Q. All right. When did the matter of having the dredge insured then come up?

A. On June 6th, when we received this letter.

Q. That is Plaintiffs' Exhibit No. 22 you are referring to?

A. Yes, No. 22. After we had paid the money in at the Army Engineers, Mr Corgan and I went down to Mr. Knapp's office. I had never met Mr. Knapp but Mr. Corgan had. There was some conversation

(Testimony of John L. Steinbach.)

with him about the insurance, and, in discussing the amount of the insurance to be carried——

Q. Give the Court the benefit of that discussion you had about the amount of insurance.

A. Yes. I was interested in just the insurance being enough to cover, to protect us for the amount that we had paid for it. I thought we should insure it for not over \$10,000 and probably \$8,000. We were kind of short of money. Mr. Knapp said that wasn't the way marine insurance was handled. He said it was necessary, before he wrote the policy, to have a survey made to determine the value and just what the insurance should be, and it would be insured for 50 per cent of the appraised valuation.

Mr. Snow: For what per cent?

A. 50 per cent.

Q. (By Mr. Winslow): Go ahead. [20]

A. While we were there, we arranged to insure the dredge while it was lying at the dock at North Bend, before the tow, against fire and sinking. Mr. Knapp asked Corgan, he said, "Cap, is this to be made out in your name?" And he said, "No" and pointed to me and said, "Steinbachs'." So I told Mr. Knapp——

Q. Tell what you told Mr. Knapp.

A. I told Mr. Knapp that this dredge had been bought for the benefit of the Steinbach wives and to make the insurance out to Carolyn and Frances Steinbach.

Q. What did he say?

A. That was all there was to it.

(Testimony of John L. Steinbach.)

Q. Did you have with you, at the time of this conversation with Knapp, Plaintiffs' Exhibit No. 22, the letter which you now have in your hand?

A. I had it in my pocket.

Q. Was Mr. Rathbun there? A. No.

Q. Did you ever meet Mr. Rathbun?

A. I never seen the man.

Q. As far as you know, did the ladies, that is, your wife and the wife of Dave, and yourself, ever transfer that boat at any time after that up to the time of the loss? A. No.

Q. Orally or otherwise? [21] A. No, sir.

Q. Mr. Steinbach, did you have anything to do with the arrangement for towing of the Dredge Wishram from Nehalem Bay to Tillamook Bay?

A. No.

Q. When was it that you learned that the dredge had been lost?

A. It was on a Friday morning, Friday forenoon.

Q. How long after the dredge had been lost?

A. The day following. It was lost in the evening, I understand, the day before. Mr. Corgan and Jim came into the shop and told me.

Q. After that did you have any negotiations or conversation with Mr. Knapp of the insurance company? A. No.

Q. By telephone or otherwise?

A. Mr. Rathbun called me.

Q. When was that?

(Testimony of John L. Steinbach.)

A. That was on the following day, on Saturday afternoon. I think it was the 3rd of November.

Q. What was the conversation you had with him then?

A. He said, "You people have lost a dredge down there, and you got a fishing boat to tow it and your insurance is void."

Q. I did not get the last.

A. He said, "Your insurance is void." [22]

Q. Go ahead.

A. And he said, "You were supposed to have gotten the Umpqua Chief," and I said, "I didn't know anything about that." He said, "It is written right in your policy."

Well, I went home—of course, I didn't have that rider there. I had the original policy that was in my wife's safe that had been written when they brought her up from Marshfield. I went and checked on it and there was no mention of the Umpqua Chief in that.

Q. Just a minute. I am handing you Plaintiffs' Exhibit No. 23. Is this the insurance policy that you examined?

A. Yes, it is.

Q. After you examined that policy, what did you do? Did Mr. Rathbun say anything about coming to Portland?

A. During the conversation he said, "You come in here Monday," and in this conversation on the telephone he said he was Mr. Rathbun. I didn't know if he was. I supposed it was him. I went home and checked on this policy and then—I didn't

(Testimony of John L. Steinbach.)

come to Portland on Monday but my brother Dave and Mr. Corgan came up here and they met up in the insurance office on Tuesday.

Q. Of course, you don't know about that.

A. I don't know anything about that. I didn't come.

Q. Had you, prior to the talk with Mr. Rathbun on what was probably the 3rd of November ever heard or had any suggestion [23] made to you that the dredge was supposed to be towed by the Umpqua Chief?

A. No. Mr. Corgan was in about two weeks before or a week or ten days before and he said,—

Q. That probably would not be admissible, what Mr. Corgan told you. A. All right.

Q. But you had no knowledge of the Umpqua Chief being required? A. No.

Q. When you examined the insurance policy, you found nothing in there about the towage being required to be made by the Umpqua Chief?

A. Nothing.

Q. When did you first find out that there was something said about the Umpqua Chief?

A. When Mr. Rathbun called me up on the 3rd of November.

Q. Two days after the loss?

A. That is right.

Q. Do you claim any interest in that dredge now, adverse to your wife? A. No.

Mr. Snow: That is objected to, your Honor, on the same ground.

(Testimony of John L. Steinbach.)

The Court: Admitted, subject to the objection.

Mr. Winslow: You may cross-examine.

Cross-Examination

By Mr. Snow:

Q. I believe you said you have been in the machine shop business in Tillamook for a good many years? A. That is right.

Q. You and your brother, David Steinbach, are partners in that business, are you? A. Yes.

Q. Do you have an assumed business name certificate on file with the County Clerk of Tillamook County? A. We do.

Q. I hand you Exhibit No. 14 and ask you if that is the assumed name certificate of the Steinbach Iron Works or a certified copy of it?

A. It is.

Q. Is that correct, Mr Steinbach?

A. Yes, sir.

Q. That certificate shows only yourself and your brother David as partners in that business, does it not? A. That is right.

Q. And that is correct, you and your brother David are the sole and only partners of the Steinbach Iron Works? A. That is right.

Q. Your wife is Frances M. Steinbach, is she?

A. That is right.

Q. You spoke about your wife lending some money for use in the purchase of the dredge?

A. I did.

(Testimony of John L. Steinbach.)

Q. I will refer you to Defendant's Exhibit No. 11 to the deposition taken in Tillamook June 17, 1946, which deposition is marked Pre-Trial Exhibit No. 7. I will ask you if that——

Mr. Winslow: What is that deposition?

Mr. Snow: Exhibit No. 7 is the deposition.

Mr. Winslow: Yes.

Mr. Snow: And Exhibit No. 11 of Exhibit No. 7 is the document to which I am calling the witness' attention.

Q. I will ask you what that document is?

A. That is a promissory note.

Q. That is a promissory note signed by the Steinbach Iron Works? A. Yes.

Q. And that is signed by yourself and also by your brother? A. That is correct.

Q. Is that your true signature there?

A. That is right.

Q. Is that the true signature of your brother?

A. It is.

Q. Is that the signature of the Steinbach Iron Works? A. It is. [26]

Q. The Steinbach Iron Works is a partnership, the partnership to which we have just referred?

A. That is right.

Q. That note is in the amount of \$2925?

A. It is.

Q. Is that the full amount of money advanced by your wife? A. Yes.

Q. In connection with the dredge?

A. That is right.

(Testimony of John L. Steinbach.)

Q. You said that you and your brother originally borrowed from her \$1675. Is that \$1675 included in the amount named in the promissory note?

A. It is.

Mr. Snow: I offer in evidence that promissory note. I think, your Honor, the pre-trial exhibits have all been offered and received in evidence and that includes the depositions as I understand it, and may it be understood that that also includes the exhibits identified at the time of the taking of the various depositions?

The Court: Yes, on the same basis as suggested before.

Mr. Snow: At this time, your Honor, I wish to note my reservation and objection to the parol testimony tending to show transfer of title by parol in the depositions, as well as the oral testimony.

The Court: Were there eleven exhibits or perhaps more [27] exhibits attached to the depositions?

Mr. Snow: There are more than eleven exhibits.

The Court: Then, when that comes in as a trial number, you will have to give it a different number.

Court will now recess until 2:00 o'clock.

(Recess.)

(Court reconvened at 2:00 o'clock p.m., pursuant to recess.)

Q. (By Mr. Snow): At the close of the morning's session, we were talking about Exhibit 11 attached to Exhibit No. 7, the depositions. I will ask the Bailiff to hand you that exhibit that you say

(Testimony of John L. Steinbach.)

is a promissory note given by you and your brother to your wife Frances, is that correct?

A. That is right.

Q. That represents the full amount of the borrowings of yourself and your brother from your wife in connection with the dredge? A. Yes.

Q. Now, I am asking you to turn in that same Exhibit No. 7, the volume of the depositions, to Exhibit No. 14, attached to Exhibit No. 7. I will ask you to state what Exhibit No. 14 is?

A. A page of a ledger sheet. [28]

Q. Is that a page of the ledger sheets of the Steinbach Iron Works?

A. I think it is, yes.

Q. Did you say yes? A. Yes.

Q. And that is the account of the Steinbach Iron Works with your wife Frances, is it not?

A. That is right.

Q. The name at the top, "Frankie", refers to your wife, does it? A. Yes.

Q. And on that ledger page, you and your brother have debited yourselves with \$2925, have you not? A. We have.

Q. Is that equivalent to the amount of the promissory note? A. I didn't hear that.

Q. Is that equivalent to the amount of the promissory note? A. Yes.

Q. And does it represent the same borrowings as evidenced by the note? A. That is right.

Q. Well, you and your brother have made some

(Testimony of John L. Steinbach.)

payments on that note, as shown by that ledger sheet, haven't you? A. Yes, we have.

Q. Those payments aggregate \$1275? [29]

A. That is correct.

Q. Those payments were made on August 27th, September 30th and October 20th in the year 1945, were they not?

A. Three of them, and then there is one credit by check from Knapp, return on insurance, the first item.

Q. Was that the return on the insurance covering the trip from Tillamook Bay to Nehalem Bay?

A. From North Bend to Nehalem Bay.

Q. North Bend to Nehalem or Tillamook Bay?

A. No, it is down at Coos Bay.

Q. I beg your pardon. Coos Bay to Nehalem Bay, then? A. Yes.

Q. On and after October 20th, the last date shown on the ledger page, you and your brother still owed your wife \$1650, is that right?

A. Yes.

Q. Have no payments been made on the debt since that time? A. No.

Q. Have you been advised by your counsel to hold that account in the same status, pending this lawsuit? A. We have never discussed it.

Q. Never discussed it? A. No.

Q. That promissory note to your wife is entirely unsecured, is it not? [30] A. Right.

Q. Never has been secured? A. No.

Q. When you and your brother borrowed that

(Testimony of John L. Steinbach.)

money from your wife, you expected to pay it back, didn't you?

A. Well, we expected to pay it back, and we didn't get it all paid back, when the dredge was in operation the dredge was to pay it back, from earnings of the dredge.

Q. You are going to carry out that intention and pay the amount of that note back?

A. Yes.

Q. You are going to pay her all the \$1650 you owe her? A. We are.

Q. You are going to do it regardless of how this case comes out? A. We are.

Q. That money that your wife loaned you came from her separate earnings and savings?

A. It did.

Q. Her earnings teaching school?

A. Yes.

Q. As far as the loss of this dredge is concerned and this outstanding insurance policy, it won't make any difference whether you collect that money, or whether your wife collects that money as a result of this lawsuit or not; she is going [31] to get \$1650, isn't she? A. She sure is.

Q. Then, as far as the loss of the dredge is concerned, she is going to get the \$1650 just the same with the dredge lost as if it had not been lost, isn't she? A. Absolutely.

Q. Then, your wife, in respect to that debt, isn't going to benefit or would not have benefited by the safe arrival of the dredge at Tillamook Bay?

(Testimony of John L. Steinbach.)

A. Well, I don't know how you mean that, Mr. Snow.

Q. What I mean is: She would still get her \$1650 back?

A. Would still get her \$1650 back.

Q. She is not prejudiced by the loss of the dredge, is she, because she will still get her money back?

Mr. Winslow: I think that is argumentative.

The Court: Go ahead.

Mr. Winslow: I think it is argumentative and immaterial.

Q. (By Mr. Snow): She is not going to be prejudiced by the loss of the dredge, is she?

A. Well, I think she will be.

Q. But she will get her \$1650 back?

A. She will get her \$1650 back, but we hold our property in common. If I make a loss, she loses, too.

Q. You say you hold your property in common. You don't hold [32] your wife's school teaching funds——

A. No, she went out and earned that herself.

Q. She went out and earned that herself; her own money? A. Her own money.

Q. You mean if you lose money you are not going to be able to supply the household as fully as if you made money, and she would lose in that respect? A. Right.

Q. You do not mean that she would be actually

(Testimony of John L. Steinbach.)

out any money herself by the loss of the dredge, do you?

A. Well, what's mine is hers. She would lose to that extent, wouldn't she?

Q. You are a generous man. You say what is yours is hers? A. Sure.

Q. But you have also said that what is hers is her own, isn't that correct?

A. Well, what she went out and earned, that is hers.

Q. That is hers? A. You bet your life.

Q. You are familiar, aren't you, with Exhibits 21 and 22 without my handing them to you—these exhibits we have been talking about this morning?

Mr. Winslow: That I had this morning.

A. Yes.

Q. (By Mr. Snow): Those are letters from the corps of Engineers [33] to Captain Corgan?

A. That is right.

Q. Transferring the dredge to him?

A. Yes.

Q. You now have those letters in your hands?

A. Yes.

Q. I think you said, but I want to make sure of it: There has been no paper written and signed by anybody, purporting to change the title of that dredge since those letters were signed?

A. That is all.

Q. Captain Corgan has never signed anything to transfer the dredge, has he? A. No.

Q. In June of 1945 the Steinbach Iron Works

(Testimony of John L. Steinbach.)

had not made any settlement with the Maritime Commission in respect to the three tugs built for the British Government? A. That is right.

Q. That shipbuilding venture was not very successful, was not a very successful one on the part of the Iron Works?

A. Well, it would have been if we had a just settlement from the Maritime Commission.

Q. If you had what?

A. If we had received a just settlement from the Maritime Commission. [34]

Q. You had not received any settlement at all in June of 1945, had you?

A. No, we hadn't.

Q. Do you recall my coming down to Tillamook in, I think, June, 1946, and taking your deposition and the depositions of the other members of the family? A. Yes.

Q. I think you said at that time that settlement had been made just very shortly before those depositions were taken, is that correct?

A. That is right.

Q. But, until that settlement was made, the Iron Works, the Steinbach Iron Works, was in a precarious, a rather precarious financial condition, wasn't it? A. I would say so, yes.

Q. When you were in Portland, discussing with Mr. Knapp about the policy, and when you told him to issue the policy in the names of your wives, your wife and David's wife, you did that, knowing that if there was a loss, none of that insurance

(Testimony of John L. Steinbach.)

money would go to the Steinbach Iron Works, didn't you?

A. Absolutely; didn't want to get mixed up with creditors on this shipbuilding deal.

Q. Talk louder.

A. When we got through with the shipbuilding deal, we had [35] \$29,000 coming from the Maritime Commission and we owed \$16,000. These creditors waited twenty-seven months before we could pay them. There was nothing coming there to protect the creditors.

Q. You did not want these creditors to get hold of that money from the dredge?

A. No, they were protected anyway.

Q. But you did not want them to get hold of any of the dredge money, is that it?

A. That is right.

Q. You didn't want them to get hold of any dredge money. That is one of the reasons you wanted the insurance policy in the names of the ladies?

A. That is right. We didn't want them to become involved in the Iron Works business.

Q. You testified, if I understood you correctly, this morning, that you told Mr. Knapp that the dredge was bought for the benefit of the two ladies?

A. That is right.

Q. I want to have you search your memory, and I am going to ask you if it is not true you told Mr. Knapp that the dredge was bought by the two ladies?

(Testimony of John L. Steinbach.)

A. I don't remember just what exactly—that has been nearly two years ago.

Q. At any rate, you did not tell him that Captain Corgan had [36] taken the letters of transmittal from the Government, had taken title from the Government to the dredge? A. No.

Q. You did not tell him Corgan really owned the dredge, did you?

A. No, I didn't, because he didn't.

Q. Is it not a fact that you told them that the ladies owned the dredge? A. Yes.

Q. Did you also tell him the ladies bought the dredge from the Government?

A. I don't remember just what was said. I said that the—no, I can't remember just what I said two years ago.

Q. I think you were confused about your testimony and that is why I would like to get it straightened out. You said when you talked with Mr. Knapp about the amount for which the dredge should be insured that he said that the dredge should be insured for 50 per cent of the appraised value.

I will ask you if it is not more accurate to say that Mr. Knapp said that the surveyor would fix two values to the dredge, one, its reproduction cost and the other its depreciated value, and that then those two amounts should be added, and the amount at which the dredge would be insured would be fixed at 50 per cent of that sum? Isn't that more nearly right? [37]

(Testimony of John L. Steinbach.)

A. I don't recall that, if he said that or not.

Q. The only basis upon which you make any claim that these two ladies owned the dredge was the family conference among members of the Steinbach family?

A. That is right.

Q. Is that right?

A. That is right.

Q. Did Captain Corgan attend this conference?

A. No.

Q. The answer is no?

A. Yes.

Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?

A. That is right.

Q. I want you to refer, if you will, to Exhibit No. 3 attached to Exhibit No. 7, the depositions. That is the assumed business name certificate in the name of the Coast Dredging & Construction, Ltd., is it not, a certified copy?

A. Yes.

Q. It shows that Hugh Corgan and J. H. Corgan are the persons interested in conducting the business of the Coast Dredging & Construction, Ltd., is that correct?

A. That is right.

Q. It is dated July 23, 1945. Were you familiar with that [38] document when it was executed by Captain Corgan and his son?

A. I was.

Q. What was the purpose of the document?

A. This was the assumed business name certificate.

Q. Was that to organize some sort of a company to operate the dredge?

A. It was.

(Testimony of John L. Steinbach.)

Q. What is that? A. It was.

Q. I will ask the Bailiff to hand you another exhibit, Exhibit No. 15. This document is dated the same date as the assumed business name certificate of the Coast Dredging & Construction, Ltd., namely August 23, 1945, is it not?

A. Yes, the 20th of August.

Q. It is recorded on August 20th but it is dated July 23, 1945. It is dated and acknowledged July 23rd, is that correct?

A. It says here August 20th, doesn't it?

Q. Yes, it says that it was recorded on August 20th, does it not? A. Yes.

Q. It shows that it was filed for record August 20th at Tillamook County? A. That is right.

Q. That is a certified copy of a document, is it not? A. I would say it is, yes. [39]

Q. Your name appears in it? A. Yes.

Q. It purports to transfer from Hugh Corgan and his wife to Hugh Corgan, J. L. Steinbach, yourself, and D. E. Steinbach, Trustees?

A. That is right.

A. Well, this, as I said——

Mr. Winslow: The agreement is the best evidence and speaks for itself.

A. This is a trust agreement.

Mr. Winslow: It seems to me like it speaks for itself.

Mr. Snow: Perhaps I should have asked this question: Will you explain the circumstances under

(Testimony of John L. Steinbach.)

which that document, Exhibit 15, was executed and recorded?

A. Well, we tried to carry out the purposes of what we had started out to do when we bought that dredge. We intended to organize a dredging company with Dave Steinbach, Hugh Corgan and myself, to take over this dredge and operate it and, as the dredge earned money, the money that was advanced by the wife would be paid back, and then the dredge would become our property and each one of us would have a one-third interest.

Q. This concern, the Coast Dredging & Construction, Ltd., was then to be the eventual owner of the dredge, was it?

A. After the money that had been advanced had been paid, yes. [40]

Q. After repayment to the Steinbach Iron Works of the money that they had advanced in connection with the dredge, the money they paid out?

A. Yes.

Q. You spoke this morning about dividing that business up three ways, a third to you, a third to your brother David and a third to Hugh Corgan, is that right?

A. Yes.

Q. Is that the way you were going to distribute the expenditures under this trust?

A. With the exception of the shares that we were to give Jim Corgan, we were going to divide 100 shares up equally, three ways, and that is covered by a letter that I wrote Corgan along the spring of the year before we bought the dredge; we

(Testimony of John L. Steinbach.)

were going to make an equal division, and there would be a share or two that we could not divide equally, and Jim was to get that share?

Q. Jim was to have a few shares?

A. I think we were dividing it up into 96 shares and each one of us was to have one-third of that and Jim was to have 4 shares.

Q. You and Dave and Hugh Corgan were each to have 32 shares, making a total of 96, and Jim was to have 4 in addition, making 100?

A. I think that is the way it was divided. [41]

Q. At any rate, you did not contemplate your wives would be interested in this trust at all?

A. Not after the dredge was paid for.

Q. I wish you would turn to Exhibit No. 7. I want to discuss something in connection with the financial operation of the dredge. The dredge was operated during the summer of 1945, was it not?

A. I think it operated about two months.

Q. Who managed it? A. Mr. Corgan.

Q. Did his son Jim help him? A. Yes.

Q. Did the Steinbach Iron Works advance some money for that purpose?

A. We did. We took care of the payrolls until they got to earning money.

Q. That was in addition to the money that had already been advanced by your wives for the purchase of this dredge? A. That is correct.

Q. I return to Exhibit No. 4 attached to Exhibit No. 7 and I will ask you what that is.

A. That is a ledger sheet.

(Testimony of John L. Steinbach.)

Q. Is that a ledger sheet of the Steinbach Iron Works?

A. Well, it was in the Steinbach Iron Works ledger. My wife kept the books. She kept this in there to keep a record. She [42] kept this in among the other ledger sheets and accounts of the Steinbach Iron Works.

Q. She did, you say, keep this in among the other ledger sheets of the Steinbach Iron Works?

A. That is right. It is taken from the Steinbach Iron Works ledger.

Q. That purports to show everything that was disbursed and received on account of the dredge, doesn't it?

A. Up to July 20th. Before we were through, that showed a balance advanced of over \$8008.59 but at the time the dredge was lost, why, we had in the neighborhood of \$9400 in it. This is not a complete account here.

Q. The last item there—look on the reverse side.

A. Oh, yes. I didn't see the other side.

Q. That carries it out to October, doesn't it?

A. Yes, I guess so.

Q. Including work done on the cutter \$534.53, in October? A. Yes.

Q. Was that about the last advance that the Steinbach Iron Works made?

A. That was correct. That left a balance of \$9446.26.

Q. Yes. That work on the cutter was done by the Steinbach Iron Works? A. That is right.

(Testimony of John L. Steinbach.)

Q. That is a part of its machine shop work?

A. Yes.

Q. And the charge was based in the same way the Steinbach Iron Works would make charges against some other customers?

A. That is right.

Q. That ledger page shows the money that was received from your wife, Frances, doesn't it?

A. Yes, it does.

Q. Will you turn to Exhibit 12 attached to Exhibit No. 7 and look at that, please?

A. That is a copy of a statement filed with Jim Corgan, secretary of the dredging company.

Q. The secretary of the dredging company? That is headed at the top "Coast Dredge Co."

A. That is right.

Q. Does that mean the same as the Coast Dredging & Construction, Ltd.? A. Yes.

Q. That shows that same balance that you mentioned a while ago of \$9446.26? A. Yes.

Q. That, I take it, may be considered as representing the amount that the Coast Dredging & Construction, Ltd., finally owed the Steinbach Iron Works on account of the dredge?

A. What they owed the Steinbach family.

Q. What they owed the Steinbach family or the Steinbach Iron [44] Works?

A. It is all the same.

Q. It is all the same, is it? A. Yes.

Q. I see. The Steinbach Iron Works still owes

(Testimony of John L. Steinbach.)

Frances Steinbach \$1650? A. That is right.

Q. Is that right? A. That is right.

Mr. Snow: That is all.

Redirect Examination

By Mr. Winslow:

Q. One question or two, Mr. Steinbach. In your cross-examination you referred to the fact that Mrs. Steinbach had put in something like \$1650 towards the purchase price, but she had contributed \$2900, a little more than \$2900, altogether. To what did she contribute besides the purchase price?

A. The insurance premium from North Bend to Nehalem.

Q. I now hand you Plaintiffs' Exhibit No. 32.

Mr. Snow: That is the \$1500 check?

Mr. Winslow: \$1250.

Mr. Snow: \$1250, yes.

Q. (By Mr. Winslow): I ask you what that check is, and what does it represent? [45]

A. A check to Addison Knapp Company, dated June 25th in the amount of \$1250 to pay insurance on the Dredge Wishram from Coos Bay to Nehalem Bay, signed by Frances M. Steinbach.

Q. And, of course, that was your wife?

A. Yes.

Q. That makes up the difference between the amount she contributed to the purchase price and the \$2900, the total amount she put in the dredge?

(Testimony of John L. Steinbach.)

A. I have the ledger account here. I could tell you in just a minute. That was No. 7, wasn't it, Mr. Snow? Yes, I think that is the difference.

Mr. Winslow: That is all.

Recross-Examination

By Mr. Snow:

Q. Let us carry that transaction a step further. That check that you have just described appears on the ledger account in the name of "Frankie", and I am referring now to Exhibit No. 7 and Exhibit No. 14. That appears as the June 23, 1945, item, \$1250, doesn't it? A. Yes.

Q. After the safe arrival of the dredge at Nehalem Bay, Mr. Knapp's company returned a check for \$414.74, isn't that right?

A. I believe that is the amount, yes.

Q. You recall that check was made payable to the two ladies? [46] A. That was.

Q. And Mrs. Dave Steinbach then endorsed it over to your wife? A. That is right.

Q. So, the Steinbach Iron Works took credit for that amount on their ledger sheet with your wife? A. That is right.

Q. That is correct, is it? A. Yes.

Mr. Snow: That is all.

(Witness excused.) [47]

DAVID E. STEINBACH

was thereupon produced as a witness on behalf of the plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Winslow: If the Court please, I am handing up to your Honor Plaintiffs' Exhibits 24 and 25. I think they should be called particularly to the Court's attention, along with this other testimony that this witness will give.

By Mr. Winslow:

Q. Your name is D. E. Steinbach?

A. Yes.

Q. Speak up. Don't nod your head. You live at Tillamook?

A. Yes.

Q. How long have you lived in that community?

A. Since the year of '19.

Q. You are associated with J. L. Steinbach in the Steinbach Iron Works?

A. Yes, sir.

Q. Mr. Steinbach, when Captain Hugh Corgan was negotiating for the purchase of the Dredge Wishram, tell the Court whom he was representing?

Mr. Snow: Objected to, your Honor.

Mr. Winslow: I agree the question in form is terrible, and I will reframe it.

A. He was representing my brother John and the two wives [48] and myself.

Q. (By Mr. Winslow): In the purchase of the dredge, did Captain Corgan contribute anything to the money for the purchase or expenses therefor?

A. No.

(Testimony of David E. Steinbach.)

Q. Who did contribute the purchase price of the dredge and the expense of getting the dredge?

A. Repeat that.

Q. Who did contribute the money for the purchase price of the dredge and the expenses of the insurance and so forth?

A. My sister-in-law, Frances Steinbach.

Q. Who else?

A. My wife, Carolyn Steinbach.

Q. The Steinbach Iron Works, did it contribute, too?

A. Well, yes, we contributed some, yes.

Q. Was there any other contribution except from the Steinbach family? Did any outsider contribute any amount?

A. No.

Q. Mr. Steinbach, at the time the dredge was purchased from the Government, or any time prior thereto, was there any discussion in the Steinbach family as to how the dredge should be purchased and in whose name or who should hold title to the dredge?

Mr. Snow: I understand I have a continuing objection to this line of testimony. [49]

The Court: It is so understood.

A. At the time of the purchase of the dredge, my brother, his wife and my wife, we met at our house and talked about what we were going to do when we purchased this dredge here to keep it out of the shop. On account of the financial difficulties there that we had with the Maritime Commission, we did not want to get it mixed up with the

(Testimony of David E. Steinbach.)

shop account, so we had put the insurance in the ladies' names to keep it away from the Iron Works.

Q. Go ahead and tell what was said.

Q. (By Mr. Winslow): Go ahead and tell what was said about whether the boat was to be purchased and held by the ladies or not?

A. I didn't quite get that.

Q. Tell what was said. What do you mean by keeping it out of the shop?

A. Well, like I said here a few minutes ago, we were so involved financially with the Maritime Commission and we did not know just how that was going to turn out one way or another, just how long we would have to wait for our money, and we also had loans from two private men there in Tillamook. One happened to the President of the First National Bank. Like my brother said, every time he went in the First National Bank he wanted to know how soon we were going to pay him back. So, what we did, we thought that would be the best way, if [50] we were going to purchase this dredge, to keep it out of the account of the Steinbach Iron Works account.

Q. Then what did you agree to do about the ownership of the dredge?

A. Well, we agreed to put it in the ladies' names.

Q. Has that agreement ever been changed in any way? A. No, it never has.

Q. You have heard the testimony of your brother about the contributions of your wives and

(Testimony of David E. Steinbach.)

the amounts. John knows more about it than you, I take it? A. Absolutely.

Q. All right. Mr. Steinbach, did you have anything to do with the towing of the dredge at the time the dredge was lost? A. No.

Q. Were you present at any time during the time it was being towed? A. No.

Q. When did you learn that the dredge had been lost?

A. Well, if I recall the right date—that is something that is pretty hard for me to try to remember.

Mr. Winslow: I think we have agreed the dredge was lost November 1st.

Mr. Snow: That is right.

A. I think November 1st or November 2nd, about 10:30 in the morning, Mr. Corgan and Jim came into the shop and said, "They [51] lost the dredge. It went out on the rocks," and also informed my brother at the same time, so we went in the office and sat there, thinking what we were going to do next and finally Corgan told me, he said, "You had better call up the insurance company and tell them the dredge was lost."

Q. Did you do that? A. I did, yes.

Q. Whom did you call? Whom did you talk with?

A. Talked with Mr. Rathbun, if that is his name.

Q. What was the substance of the conversation?

A. I just told him who I was and I told him the Dredge Wishram was washed out on the end of the jetty, and he wanted to know when it hap-

(Testimony of David E. Steinbach.)

pened and I told him I couldn't give him the exact hour because I did not know what time in the evening, or did not know just what time it was, but I told him it was lost. He wanted to know if it was a total loss and I said, "Yes."

Q. Go ahead. Anything further?

A. Well, on that telephone conversation, it was rather short.

Q. Yes. Then what did you do the following day or following that conversation? Did you come to Portland?

A. I came to Portland on June—no, on November 6th or 7th.

Q. What date was it? A. On the 6th.

Q. What day was it, do you remember? [52]

A. Golly, George, I don't remember. I know it was about four days after.

Q. Did you go to Mr. Knapp's office then?

A. Yes.

Q. Who was with you?

A. Mr. Corgan and Jim Corgan.

Q. Tell the Court what took place when you went in there to see Mr. Knapp? What was the conversation?

A. We went into his office. He met us in the outer office with Mr. Rathbun. From there we went into Mr. Knapp's private office and sat down, and the conversation was about the wreckage of the *Wishram*. Of course, I was not acquainted with Mr. Knapp or Mr. Rathbun like Corgan was.

Q. Tell us what the conversation was.

(Testimony of David E. Steinbach.)

A. As close as I can tell, we got talking about the wreckage of the Wishram.

Q. Go ahead.

A. And he wanted to know what time it was.

Q. You tell what was said there at this time, Mr. Steinbach.

A. I will tell you. Of course, being a little bit hard of hearing, I couldn't quite get all of it, so about the end of the meeting that we had in Mr. Knapp's office he handed a letter to Jim Corgan and wanted to know if we had received the letter that they had sent to us and I said, "No." So, he had pulled a copy of the letter that he had sent to us [53] and wanted to know if they had seen anything and Mr. Corgan and Jim said, "No," because they had never corresponded with me.

Q. Tell us what was said.

A. Well, it has been quite a long time ago and I rather forget a lot of the conversation or anything at the time. When we got up to go out, we stood around in a group, Mr. Corgan, Rathbun and myself, ready to shake hands, and he was talking to Cap Corgan and he said, "Well," he says, "it looks like we are stuck for the wreckage." We said, "Good-bye" and walked out. To go into details, that has been too far gone. [54]

* * * * *

Cross-Examination

By Mr. Snow:

Q. You spoke about the Steinbach Iron Works

(Testimony of David E. Steinbach.)

being involved financially and owing two individuals in Tillamook. Who are those men?

A. Mr. Vickers, President of the First National Bank and Charlie Lamb.

Q. What was the aggregate amount you owed them?

A. How much money we owed them? [56]

Q. Yes. A. \$7000.

Q. That is, the two of them together?

A. Yes, \$3500 apiece.

Q. Is that evidenced by a promissory note?

A. It was, yes.

Q. Did you and your brother both sign those notes? A. Yes.

Q. Any other members of the family?

A. Well, I couldn't say, but I imagine that they did.

Q. You are not sure of it, though? A. No.

Q. In addition, the Steinbach Iron Works owed quite a lot of money on open account, didn't it?

A. I was not following that. My brother did that. I was running the shop. He took care of the books.

Q. You were not as familiar with the details of the Steinbach Iron Works as your brother?

A. Well, I was familiar, yes.

Q. You know how much they owed?

A. I know how much they owed, yes.

Q. How much did they owe?

A. Oh, about \$16,000.

Q. In addition to the \$7000? A. No. [57]

(Testimony of David E. Steinbach.)

Q. Including the \$7000?

A. \$7000, yes; including the \$7000. Yes, that was my understanding.

Q. The total debts were not \$29,000?

A. What is that?

Q. The total debts were not \$29,000?

A. No. No.

Q. That was the situation at the time the dredge was purchased from the Government, was it not?

A. Will you repeat that?

Q. Was that the situation at the time the dredge was purchased from the Government? Was that the situation in June, 1945?

A. Yes, I believe it was.

Mr. Snow: That is all.

Mr. Winslow: That will be all.

(Witness excused.) [58]

HUGH CORGAN

was thereupon produced as a witness on behalf of the plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

Q. What is your full name?

A. Hugh Corgan.

Q. Where do you reside now?

A. Rockaway.

Q. How long have you resided at Rockaway?

(Testimony of Hugh Corgan.)

A. Oh, since 1945—1944, in fact.

Q. Where did you reside before that?

A. Portland.

Q. How long have you resided around Portland?

A. Well, my home, that is, my lighting place, was Portland for the last thirty-five years.

Q. What has been your business, Mr. Corgan?

A. Dredging business and captain of towboats and passenger boats.

Q. How much experience have you had in that line of work?

A. Since I was twenty-one, on the Great Lakes and the ocean.

Q. How long ago was that?

A. Well, let's see. Since I was twenty-one I had papers and I am now sixty-eight, or sixty-eight my next birthday.

Q. Have you had any experience in towing?

A. Absolutely.

Q. How long have you known the Steinbachs, just generally?

A. Oh, I would say almost thirty years. I was at first at Yaquina. That was my first connection. That was about 1912.

Q. What did you have to do with the purchase of the Dredge Wishram in 1945?

A. I purchased her as agent for the Steinbachs.

Q. Did you have any financial interest in the purchase at all?

A. I had not ten cents.

(Testimony of Hugh Corgan.)

Q. Do you claim any financial interest in the dredge now? A. I do not.

Q. Briefly, tell the Court how the purchase of this dredge, the Wishram, was handled by you?

A. Well, Mr. John Steinbach came to me first, knowing that I was an experienced dredge man, and he put a proposition up to me, asking me if I would be interested as a member of a company, providing he would give me a working interest in it until that part of it was paid and then I would become an owner.

Q. All of it? A. A third.

Q. A third? A. Yes.

Q. That wasn't quite an answer to my question. How was it [60] intended between you and the Government—

A. Well, I had been with the Government for a number of years and, knowing dredges, he asked me if I would handle the purchase of the dredge.

Q. Tell what you did in the matter of the purchase of the dredge from the Government?

A. I went and got the data on the dredge from the Government Engineers.

Q. Yes; go ahead.

A. Then I bought the dredge in—bid the dredge in with the Steinbachs' money and immediately handed over the letter that the Government gave—the Government does not give a deed to any of that property when you bid. They simply give you so many days to get the property away from the mooring, or wherever it is located.

(Testimony of Hugh Corgan.)

Q. When you got the letter from the Engineers, the letter which we have marked here as Plaintiffs' Exhibit No. 22, acknowledging receipt of the purchase price of the dredge and telling you to come and get it—in other words, that is the substance of the letter. Where did you get that letter?

A. I got it from the Engineers.

Q. Whereabouts? Here?

A. Yes. They were then located in the Pittock Block.

Q. Who was with you?

A. Well, I don't remember as anybody—I believe John was [61] with me and I handed him the letter at their office, not then—the next day—at Tillamook.

Q. You did not keep the letter yourself?

A. I didn't.

Q. After you got that letter, what did you do with reference to having the dredge insured?

A. Well, I went—first, I consulted with the Steinbachs and then I went to Knapp and Rathbun whom I had done business with for years, and I was told that Mr. Banks would have to handle it because it was in his territory.

* * * * *

Q. Who is Mr. Banks?

A. He is with Kruse & Banks Shipyards.

Q. What do you call it?

A. Kruse & Banks at Marshfield.

Q. Was he connected with the insurance company in any way?

(Testimony of Hugh Corgan.)

A. Yes, he is their representative at Coos Bay.

Q. Did Mr. Knapp or Mr. Rathbun tell you that? A. Yes, both of them.

Q. What discussion did you have with them in reference to the amount of insurance?

A. They wanted—they insisted on insurance for two or three times what I wanted. On account of the Steinbachs, I knew that they could not afford to pay any such premium.

Q. Yes.

A. We dickered back and forth and they had to get in touch [62] with 'Frisco and it took, I guess, a couple of weeks or so, before we came to an understanding with them.

Q. What was the subject of the discussion? Did you want to insure it for more than \$12,500?

A. No, they wanted to insure for the replacement value.

Q. What did they say that was, approximately?

A. I think it was in the neighborhood of \$30,000.

Q. When the insurance policy was finally agreed upon, do you remember who was present?

A. Yes.

Q. Who? A. John Steinbach and myself.

Q. Was there any discussion at that time? Was there any discussion between John Steinbach and—Who was representing the insurance company?

A. Mr. Knapp.

Q. Mr. Knapp? A. Yes.

Q. Was there any discussion at that time as to

(Testimony of Hugh Corgan.)

how much insurance should be issued and in whose names?

A. Well, John said the Steinbach women, Mrs. Dave Steinbach and his wife, Frances.

Q. You did not claim to own any interest in it then, did you? A. No. [63]

Q. And don't now? A. No.

Q. Did Mr. Steinbach say anything more to Mr. Knapp as to why the policy was being issued in the names of the ladies?

A. Yes, he did. In regard to the condition of the Steinbach Iron Works at that time, he said he did not want it connected in any way with the Iron Works.

Q. That is, the ownership of the dredge?

A. Yes, the ownership of the dredge.

The Court: Have him tell whether the insurance company knew the circumstances as to how it was being purchased, who paid for it and the letter from the Government. Did they know about that?

Q. (By Mr. Winslow): Were the insurance company representatives ever shown this letter that you got from the U. S. Engineers?

A. I don't know. I know that Steinbach had it in his pocket because I told him to be sure and have it when we went in.

Q. Did you ever tell Knapp or Rathbun that Steinbachs owned it, or that you had any interest in it? Did you ever tell them whether you were just representing Steinbach or representing yourself?

The Court: Did the insurance company know

(Testimony of Hugh Corgan.)

that it had just been bought from the Government?

A. Yes, they did.

Q. Did they know who bought it, how it had been done, or [64] what had been paid for it?

A. I don't know as to that, whether they knew.

Q. Did they know how it had been bought?

A. That I don't know. They most surely knew me well enough to know I didn't have it at the time.

Q. (By Mr. Winslow): How is that, again?

A. They knew me long enough to know I didn't have it.

Q. Do you recall during these negotiations whether or not you made any suggestion to the insurance company that you were acting as agent of the Steinbachs?

A. What is that question?

Q. Do you recall at any time during these negotiations that you made any suggestion to Mr. Knapp that you were acting as agent of the Steinbachs?

A. Well, I wouldn't say that I did, see?

The Court: What interest did they think you had in it? Where did they think you came in on the deal?

A. Well, they knew the Steinbachs was with me almost from the time that we went in.

Q. Did you tell them you had planned to go back to Tillamook, you three, and go into business together?

A. Well, I wouldn't say, but I know that Rathbun knew. We had talked many times together and

(Testimony of Hugh Corgan.)

we had been friends for many years. I wouldn't say positively, but I am sure that I did him. [65]

Q. (By Mr. Winslow): You were present when Mr. Steinbach told him to write the insurance in the ladies' names? A. Absolutely.

Q. You did not object to that? A. No.

Q. And do you now? A. No. [66]

* * * * *

Q. What time was it the day before you approached Mr. Berg to make this tow?

A. The evening before.

Q. How about the towline? What was said about the towline? A. Well, Ole Johnson——

Q. Did Mr. Berg have any towlines?

A. No, he had no towlines, so I figured that any towline that the Coast Guard would recommend was good enough for me, and, so, Ole Johnson—he was just retired from the Coast Guard—went in and looked into that and made arrangements for a towline, and he pronounced the towline “A” Number 1, and it had just been taken off a Coast Guard boat.

Mr. Snow: I move to strike out what Ole Johnson said. That is hearsay, I think they should have Ole Johnson here.

The Court: Who was Johnson?

Mr. Winslow: He is a man who had been with the Coast Guard.

The Court: Was he the extra man?

A. Oh, no.

The Court: The answer may stand.

(Testimony of Hugh Corgan.)

Q. (By Mr. Winslow): All right. Where was that towline [72] delivered to Berg?

A. The towline was delivered to Berg at the Coast Guard dock, at the mooring of the boat, the Coast Guard boat.

Q. You were not, yourself, present when that was actually done?

A. No, I sent my son, and Orville Boster and a Coast Guard fellow—I don't know his name.

(Recess.)

Q. You say this was the day before you got the towline, the day before?

A. The evening before, yes.

Q. Were you present at the dredge, then, the next morning? A. Yes.

Q. Just where was the dredge located?

A. At Dave Chambers' mooring at Wheeler.

Q. At Wheeler, Oregon? A. Yes.

Q. What time, approximately, did the tugboat get there?

A. Oh, around 9:00 o'clock, I think, in the morning.

Q. What did you do then? What was done there, rather, in regard to getting the towage on its way?

A. She was all ready for the boat to come in, which she did, and hook onto her and connect her towline to the bridle. That was all ready.

Q. You saw the towline there, didn't you? [73]

A. Yes.

Q. You did not, yourself, examine that particular towline? A. I didn't

(Testimony of Hugh Corgan.)

Q. Who composed the crew of Mr. Berg.

A. Well, I was told it was him and his brother.

Q. Did someone else go along with them on the trip?
A. Yes.

Q. Who was that?

A. Jim Brakeman, as a passenger.

Q. What is that?
A. As a passenger.

Q. What, if any arrangement, had you made prior to that time about having the Coast Guard to stand by?

A. I requested the Coast Guard to stand by in case of any mishap, or, you know, for safety.

Q. What did the Coast Guard do between bars?

A. Stood by, as far as I could see.

Q. Did you watch them?
A. Yes.

Q. How far away were you?

A. Well, I was standing down at the jetty and watched them cross the bar, and then I followed them right on up the coast to Tillamook, that is, to the whistling buoy.

Q. Where was the Coast Guard during that time?

A. Just close to the towboat and dredge [74]

Q. What was the condition of the weather that day, as you observed it?
A. Beautiful.

Q. I suppose that means the sea——

A. The sea was calm; no wind to speak of.

Q. Captain Corgan, in your experience, did you believe the Julia D was a competent boat to do that tow?

A. I had all the confidence in the world——

(Testimony of Hugh Corgan.)

Mr. Snow: I object to the question, your Honor. The question here is not whether the *Julia D* was a competent boat or not. The question is whether he represented that the *Umpqua Chief* would do the towing; and, also, the question is whether he disclosed to the insurance company that the *Julia D* was doing the towing. It has nothing to do with competence at all. If the *Julia D* was the best boat in the world, still there would be a failure to disclose it and misrepresentation.

The Court: He said he did disclose it, that he was going to get the *Faymar* or some boat of that same type.

Mr. Snow: Nevertheless, competence has nothing to do with it.

The Court: It is admitted for whatever it is worth.

Q. (By Mr. Winslow): Did you ever live at Garibaldi? A. Never.

Q. Did you ever get any mail there?

A. Never. [75]

Q. Who is J. H. Corgan? A. My son.

Q. Your name is Hugh Corgan? A. Yes.

Q. Mr. Corgan, had you known that the insurance company was insisting upon the tow being made by the *Umpqua Chief*—— A. Never.

Q. I say, had you known. Just wait.

A. I hadn't.

Q. I know. Had you known that——

A. Oh, excuse me.

Q. Let me finish my question. A. Yes.

(Testimony of Hugh Corgan.)

Q. Had you known that the insurance company was insisting that the tow be made from Nehalem Bay to Tillamook Bay by the Umpqua Chief, would you have it towed by the Julia D? A. Never.

Q. How long does it take you to get mail from Portland to Rockaway? If mailed in Portland to-day, when would you get it in Rockaway?

A. Well, sometimes it gets there the next morning and other times it is a little late, you know.

Q. You get mail there, how many times a day?

A. Twice.

Q. Now, Mr. Corgan, we are all agreed that the dredge went [76] on the rocks, and we are agreed it was the 1st of November, 1945. A. Yes.

Q. What did you do then? Did you come to Portland very soon, then?

A. The next morning—of course, it was along about 8:00 o'clock, I think, or thereabouts, when the dredge floundered, and I went—of course, it was dark, and I went over to Rockaway and one of the Coast Guard, or somebody, told me that the dredge was unsafe at Garibaldi, so I said to my son, I said "for God's sake, let's beat it."

Q. I think we are all agreed it was a total loss.

A. Yes.

Q. What I want to lead up to is this: Did you soon come to Portland, Oregon, to the insurance company? A. Yes.

Q. Who came with you?

A. Dave Steinbach and my son.

Q. Your son, J. H. Corgan? A. Yes.

(Testimony of Hugh Corgan.)

Q. Let me ask you this question: Did your son have any part in the negotiations for the insurance, the extended insurance, or any part of that, with the insurance company? Did he take part in any of those negotiations prior to the loss?

A. No, sir.

Q. When you went to the insurance company with Mr. Dave Steinbach, tell the Court just what took place there, as nearly as you can. Whom did you meet? What was done?

A. Well, we went into the outer office and we were shown into Knapp's office, and there was Mr. Knapp and Emmett Rathbun and Dave Steinbach and Jim and myself.

Q. All right.

A. So, finally, Mr. Knapp said "Did you get my letter?" I said "Yes" and he said "How come you didn't get the Umpqua Chief?" I said "What do you mean, get the Umpqua Chief?" and, so, he said "Didn't you get my letter?" I said "I guess I don't know what letter you are referring to." "Well" he said "we posted it to you about the Umpqua Chief." I said "If you did, it never arrived," so he goes out and gets a copy of the letter, and I read it—my eyes were okeh then. I read the letter and I said "You are crazy. We never got it. I never got any such a letter," and I looked at the name and here was "Garibaldi" on top.

Q. What was the rest of the conversation then?

A. Well, he went out, then, in the outer office and talked to one of the girls and then he came

(Testimony of Hugh Corgan.)

back, and he admitted that it was sent to Garibaldi. There wasn't much more talked about. I got up and left, and Mr. Rathbun shook hands with me and said—on the way out, he said "Well, Cap, it looks as if we are hooked," and I said nothing.

Q. This letter—you say you could read then all right? [78] A. Yes.

Q. What is the matter with your eyes now?

A. Well, it was on that evening that my eyes—this one eye is all I had sight in. The next morning, when I got up, I was nearly blind.

Q. You have a pretty hard job reading now?

A. Yes.

Q. If I could read the letter to you now that Mr. Knapp showed you, would you recognize it?

A. Yes, sir.

Q. It reads: "Captain J. H. Corgan, General Delivery, Garibaldi, Oregon. Dear Capt. Corgan: In accordance with your recent instructions, we are sending you herewith endorsement applying to Universal Policy PC 50295 extending it to cover one trip of the Dredge 'Wishram' while being towed from Nehalem Bay to Tillamook by the tug 'Umpqua Chief.'

"Surveyor Rathbun has approved this tow only if made during calm weather. Under the circumstances, I trust you will be vary careful in picking the weather for the trip."

Is that the letter? A. Yes.

Q. Is that the letter that he pulled from his file and that you have been telling us about?

(Testimony of Hugh Corgan.)

A. Yes, that is the letter that came to Garibaldi.

Q. And it was a copy of that letter that he showed you in his office? A. Yes.

Q. That is what I wanted to identify.

A. Yes.

Q. I will ask you this: At the time of this discussion which you have referred to, in his office after the loss, was that the first time that you ever heard anything about this tow being made by the Umpqua Chief? A. Yes, sir.

Mr. Winslow: You may cross-examine.

Cross-Examination

By Mr. Snow:

Q. Was your first approach to Mr. Knapp and Mr. Rathbun about the insurance of the dredge at the time of your trip to Portland with Mr. and Mrs. John Steinbach? That is, in reference to the Coos Bay tow, the original insurance policy on the dredge? I am talking about June of 1905.

A. Yes.

Q. You and Mr. and Mrs. Steinbach went into Mr. Knapp's office, I understand?

A. Mr. Steinbach and myself.

Q. Mrs. Steinbach did not go along?

A. No. [80]

Q. Now, how long was that after—if it was after—you got the letter from the Government, from the Engineers' Department, transferring the dredge to you?

(Testimony of Hugh Corgan.)

A. Well, I wouldn't be sure that I didn't get it before.

Q. You mean, you may have got the letter before you went to Knapp's office?

A. Yes, before I applied for any insurance.

Q. That is what I thought. You think you did get the letter before you went in to apply for insurance?

A. Yes. I don't think I would have applied for insurance until we were assured that we or Steinbachs had title, or, that is——

Q. So, you think after you got the letter from the Government you applied for the insurance, do you?

A. I think so, yes.

Q. This application was not made on the telephone, but made in person, was it?

A. It was made in person.

Q. You went into Mr. Knapp's office and talked that over?

A. Yes.

Q. When you got the letter from the Engineers, transferring the title, or transferring the dredge, you handed that letter, you say, to Mr. John Steinbach?

A. Yes.

Q. When you went into Mr. Knapp's, you had considerable [81] discussion about the value at which the dredge was to be insured, did you not?

A. Yes, sir.

Q. It took a couple of weeks to work out that valuation?

A. I would say that, yes.

Q. You say Knapp wanted you to insure it for its replacement value?

A. Yes.

(Testimony of Hugh Corgan.)

Q. \$30,000?

A. I wouldn't say exactly that it was \$30,000, but it was outlandish.

Q. Who named that figure of \$30,000?

A. Right in Knapp's office—Knapp himself.

Q. Did Mr. Knapp, in that same conversation, say that, since this was Mr. Robert Bank's jurisdiction down in Coos Bay, he would have to make a survey? A. Yes.

Q. You think at the same time Mr. Knapp expressed the opinion that the replacement value of the dredge was \$30,000? A. Yes.

Q. Did you ask Mr. Knapp what made him think that the dredge was worth \$30,000?

A. Well, no, because I knew it was worth that.

Q. You knew it was? A. Yes. [82]

Q. I thought you considered the figure outlandish in describing it.

A. No, outlandish according to the price and money that we would have to pay for a \$30,000 policy. We were not looking to sell the dredge.

Q. That figure of \$30,000 was your own idea of the value of the dredge?

A. The actual cost to the Government was \$49,000.

Q. I am not asking you about the cost to the Government. Did the figure of \$30,000 come out of your own imagination, as to the value of the dredge?

A. Out of my knowledge of those.

Q. Then, Mr. Knapp did not express himself as

(Testimony of Hugh Corgan.)

being of the opinion that the dredge was worth \$30,000, did he?

A. He said that the insurance company insisted on insuring for practically the full valuation.

Q. Didn't he explain to you at that time that the insurance company took two values, the replacement value and the depreciated value, and averaged them to get at the proper insurable value?

A. I didn't go into that with him. He told me he would take it up with the 'Frisco office and let me know, and I told him that if we had to—if they insisted, we would carry our own insurance.

Q. I would like to know how Mr. Knapp—whether Mr. Knapp [83] got it through you, or whether it was someone else's idea that the dredge was worth \$30,000?

A. Well, I presume from his knowledge of floating equipment.

Q. Do you think Mr. Knapp ever saw that dredge before that?

A. He had saw drawings of it and got the information, undoubtedly, from the Government office, which anybody could get.

Q. Eventually, the insurable value of the dredge was fixed at \$12,500? A. Yes.

Q. That was based on Mr. Banks' appraisal?

A. Well, there were a number of conversations through Knapp—with Knapp and Banks, and so on, and they had arrived at that between themselves.

Q. You recall Mr. Knapp asking in whose name the insurance policy was to be issued?

(Testimony of Hugh Corgan.)

A. Yes.

Q. Did you then reply, in the names of the ladies?

A. Mr. Steinbach did.

Q. Mr. Steinbach did?

A. Yes.

Q. Do you recall Mr. Knapp saying "How is that?" and asking for an explanation of that?

A. Yes, I believe he did.

Q. Did you then tell Knapp that the ladies had bought the dredge from the Government? [84]

A. Mr. Steinbach had this letter from the Government in his pocket and it was Mr. Steinbach who told Mr. Knapp to make the policy out in the ladies' names, owing to the fact that he did not want it to be connected with the Iron Works.

Q. Do you recall definitely now that Mr. Steinbach said anything about connecting the dredge with the Iron Works in Mr. Knapp's office?

A. Yes.

Q. He had told you that previously, that he didn't want it connected with the Iron Works, hadn't he?

A. Oh, yes.

Q. And you think that he also said, when he was in Mr. Knapp's office, that he did not want it connected with the Iron Works?

A. He told Knapp to make the policy out to the ladies.

Q. That is all he told him?

A. No, it wasn't. He told Knapp at that time his reasons.

Q. And his reason was that he did not want it connected with the Iron Works?

(Testimony of Hugh Corgan.)

A. Yes, and that they had advanced the money.

Q. Well, did Mr. Steinbach at that time go on and tell Mr. Knapp all about the arrangement of going into business together, or anything about it?

A. No, I don't think he did.

Q. He didn't say that you and he and Dave Steinbach were going [85] to divide the profits three ways, did he?

A. No, I don't think so.

Q. Did he say anything about the proposed organization of the Coast Dredge & Construction, Ltd.?

A. No, he didn't. We were in there on business, not social.

Q. I am talking about in Mr. Knapp's office.

A. Yes. That is when I mean. [86]

* * * * *

Q. On the towage to Nehalem Bay, did the Umpqua Chief furnish the hawser?

A. Yes.

Q. It was ample, was it?

A. Yes.

Q. Do you know what size it was?

A. Yes, I would say it was six-inch.

Q. Who furnished the bridle?

A. They did.

Q. The Umpqua Chief?

A. Yes, absolutely.

Q. Was the bridle steel?

A. Yes. [88]

* * * * *

Q. You recall the taking of your deposition in Portland, do you not?

A. I think so, yes.

Q. Well, don't you remember?

A. Well, I remember, yes, that it was taken.

(Testimony of Hugh Corgan.)

Q. Do you recall meeting in a room in the Pacific Building? A. Yes.

Q. With your two attorneys, Mr. Phillips and Mr. Winslow? A. Yes.

Q. And do you recall my being present, and a reporter? A. Yes.

Q. You testified at that time, did you not, that you made your arrangements with Otto Berg two weeks before the tow? A. I did. I said that.

Q. Now, you say it is a mistake?

A. I just say this. You know, it had been so long since the floundering of the dredge and there was so many things come up that afterwards I did think that I had made a mistake in making that statement.

Q. Didn't you testify at that time you made this arrangement [95] with Otto Berg two weeks before the towage, and that you had to wait three weeks on account of the weather?

A. Yes, I say—that is what I say. It was the night before the tow was made.

Q. Now, you say you made that arrangement with Berg the night before the tow took place?

A. Yes, the night before and the night before the towline was put on.

Q. Then, you did not wait at all for the weather, did you? A. Just the next morning.

Q. I will ask you if you testified to this effect at the time of the taking of your deposition in Portland—

Mr. Winslow: Where are you reading from?

(Testimony of Hugh Corgan.)

Mr. Snow: Reading from page 30, the bottom of page 30.

Q. "Question: Did you mention the Julia D to Mr. Rathbun when he came down to survey the dredge?

"Answer: I would have to look that up to see what time—I have the time when Mr. Rathbun came down.

"Question: What would you look it up in?

"Answer: Well, in my check book, and dates down there at Rockaway.

"Question: What dates?

"Answer: That I was there at Rockaway waiting for the weather.

"Question: Did you wait quite a long time for the weather to be right after you made the arrangement with Otto Berg?

"Answer: I believe about three weeks." [96]

Did you so testify at that time? A. Did I?

Q. Did you testify as I have just read at that time?

A. Yes, I probably did, but I did wait three weeks before the weather was fit or I was fit to have the dredge go out.

Q. During those three weeks, what efforts did you make to find a towboat?

A. We were negotiating for the Faymar at that time.

Q. You had no negotiations with Otto Berg?

A. No, sir.

(Testimony of Hugh Corgan.)

Q. Until the night before the towage?

A. Until the night before the tow. [97]

* * * * *

Q. Now, when was it that you first talked with Otto Berg about this towage?

A. The first time I talked to him or ever met him was the night before the tow.

Q. When was it that Jim first talked with him?

A. Oh, I guess Jim has.

Q. What is that?

A. I don't know when he first talked with him.

Q. I mean about this particular tow. These boys had been acquainted before, hadn't they?

A. Yes.

Q. When was it that Jim first talked to him about the tow?

A. Well, I wouldn't say. I don't know.

Q. You testified a while ago that you first engaged Otto Berg only the night before the towage to make the tow. Do you mean to say or to exclude the possibility of Jim having engaged him before that?

A. Jim had no authority to engage him.

Q. You were the man who engaged Otto Berg to make the tow, were you? [102]

A. I was.

Q. And that was the night before?

A. The night before.

Q. But you do not know when Jim first approached him about this?

A. Jim spoke to me some time before that—I

(Testimony of Hugh Corgan.)

don't know how long it was—just a short time—and told me about this boat.

Q. When was it you approached the Coast Guard about borrowing the hawser? A. I didn't.

Q. You didn't? A. I didn't. Johnson.

Q. When was it you approached Johnson? That is Ole Johnson? A. Yes.

Q. When was it you got in touch with him about borrowing this hawser?

A. Well, it was several days before that.

Q. Several days before? A. Yes.

Q. Where were you and Otto Berg, Jr., when you made the deal to do the towing?

A. Down in front of his house at Garibaldi, where he lived, the old Coast Guard station. [103]

Q. He lived back of the Coast Guard station, did he? A. Yes.

Q. Up on the hill? A. No, down.

Q. Down the hill? A. The old station.

Q. Below the station?

A. No, the old one, the old Coast Guard station.

Q. You were at his house, were you?

A. No.

Q. Where were you standing outside?

A. In my car.

Q. The coast—The road runs past the Coast Guard station, doesn't it?

A. The present one?

Q. Yes. A. Yes.

Q. That is where your car was parked, on the highway?

(Testimony of Hugh Corgan.)

A. No. It was down at the old one.

Q. What time of night was that?

A. Oh, it was in the evening.

Q. Was it after dinner?

A. I don't know whether I had my dinner or not.

Q. Was it dark? A. Yes. [104]

Q. Did Otto Berg give you a figure of \$150 plus \$25 for another man? A. Yes.

Q. Did he tell you then he did not have any hawser or bridle? A. Yes, he did.

Q. So, then, you got the bridle from the Coast Guard?

A. I didn't get the bridle from the Coast Guard.

Q. So, then, you got the hawser from the Coast Guard? A. I didn't get it.

Q. You mean to say Johnson got it, is that it?

A. Johnson made the arrangements, and my son, Orville Boster, and one of the Coast Guard boys went down—I drove down as far as the entrance to the ramp that goes out there, and I stayed in the car, owing to the fact that it was raining, and my son and Orville Boster and this Coast Guard fellow went out and played the line out the window to Otto Berg. That is hearsay with me because I wasn't there.

Q. What time of night was that?

A. Oh, I think it was along about, maybe 2:00 or 3:00.

Q. Was that before or after you made the deal with Otto Berg to do the towage?

(Testimony of Hugh Corgan.)

A. Well, it was after because he towed her the next day.

Q. You said you were uncertain—the time at which you made the deal with Otto Berg.

A. It was the day before the tow. [105]

Q. It was the night before the tow, was it?

A. Yes, or the day before.

Q. Let's go back over that again. What day of the month did you make your deal with Otto Berg?

A. Well, I would say it was either the 30th or the 31st of October.

Q. The towage took place on the 1st of November, didn't it? A. Yes.

Q. You testified heretofore, if I remember correctly, on direct that you made the deal on towing the day before the towage took place. A. Yes.

Q. Well, that would be the 31st, the 31st of October, wouldn't it? A. Well, the 31st.

Q. Now, do you want to change that to the 30th?

A. No.

Q. You are satisfied to keep it the 31st, are you?

A. Yes.

Q. That took place at night? That deal took place at night, when it was dark?

A. Well, I don't—I wouldn't say positively about that, because we were doing so much running around and the circumstances under which we went down there. Jim went into the house and we parked there—that is, my son Jim. We [106] parked outside the house and Jim went in and got Berg to come out and talk to me.

(Testimony of Hugh Corgan.)

Q. Who made the deal with Johnson?

A. He simply told me that the Coast Guard had a bunch of good lines and that he was sure that he could get one from them. So, I said "Go to it." He came back and said that we could get it, so that was the extent of the deal.

Q. You spoke of this hawser that you borrowed being highly recommended by the Coast Guard, the United States Coast Guard. Who recommended the hawser on the part of the Coast Guard? Ole Johnson?

A. Well, Johnson said it was, but I don't think I said that it was highly recommended. I said any hawser that would take care of a Coast Guard boat would take care of a small boat like the Julia D.

Q. I think you said any hawser recommended by the Coast Guard was good enough for you.

A. Recommended, yes.

Q. Ole was the man who recommended the hawser to you? A. Yes.

Q. Anybody else on the part of the Coast Guard?

A. No, sir.

Q. Who was at the head, or the commanding officer, or petty officer, as the case might be, of the Coast Guard station at Garibaldi at the time you got this hawser? A. Mr. Paris.

Q. Did you ever ask Mr. Paris for the loan of this hawser? A. Not as I remember.

Q. Did Mr. Paris personally tell you that you could use the hawser?

(Testimony of Hugh Corgan.)

A. Not to my recollection.

Q. Did Mr. Paris recommend the hawser to you?

Mr. Winslow: He has testified he didn't make the deal with the Coast Guard at all.

Mr. Phillips: He testified he did not have anything to do with the Coast Guard.

Q. (By Mr. Snow): Did Mr. Paris recommend that hawser to you? A. No.

Q. Did you ever—

Mr. Phillips: Let the witness finish his answer.

A. Ole Johnson was the man.

Q. (By Mr. Snow): Did you ever have any conversation at all with Mr. Paris about this hawser?

A. Not as I remember.

Q. To your knowledge, did Mr. Paris have any knowledge that the hawser was being taken out of the Coast Guard station and used for this towage?

A. I wouldn't say that he did.

Q. You never saw the hawser yourself, did you?

A. No.

Q. You were the general manager of the dredge, weren't you? A. Yes.

Q. You knew that a hawser was going to be used on this towage, didn't you? A. Yes.

Q. But you did not inspect that hawser before it was used? A. No.

Q. You just took Ole Johnson's word that it was a good hawser?

A. He was a tugboat man. He handled every inch of that line when it went over the boat. There-

(Testimony of Hugh Corgan.)

fore, if he was a towboat man he would know whether the hawser with a fit line to take.

Q. You did not, and you do not, feel you had any responsibility as to the strength of that hawser or thickness of the hawser for that voyage?

A. Not after the tugboat accepted it. [111]

Q. Did you tell Mr. Rathbun, or anyone else on the part of the insurance company, that this towage was to be undertaken with a hawser borrowed from the Coast Guard?

A. I don't think I did, no. [112]

* * * * *

JAMES H. CORGAN

produced as a witness on behalf of Plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

Q. Your name is James H. Corgan?

A. Yes, sir.

Q. Where do you reside?

A. Rockaway, Oregon.

Q. How long have you resided there?

A. Since '45.

Q. You are a son of Hugh Corgan who was just on the witness stand? A. Yes, sir.

Q. What is your business, Mr. Corgan?

A. Well, I have been working on construction, general construction.

(Testimony of James H. Corgan.)

Q. In what capacity?

A. Oh, foreman.

Q. Were you acquainted with the Dredge Wishram?

A. Yes, sir.

Q. Did you work on the dredge at Nehalem Bay?

A. Yes.

Q. Do you recall when the matter came up of towing the [115] dredge from Nehalem Bay to Tillamook Bay? You recall about that matter coming up?

A. Yes, I do. [116]

* * * * *

Q. When were negotiations with Otto Berg commenced, if you know?

A. Negotiations were made the day before, on the 31st of October, just before lunch.

Q. How is that?

A. The 31st of October.

Q. You say, just before lunch?

A. Yes, the day before.

Q. Who made that contact with Otto Berg?

A. Well, I drove down to his house, in front of his house, across the railroad track at Barview. I went to the door and he came out from his house, out to the car, and talked with my father.

Q. It was not very dark then?

A. No, it really wasn't dark.

Q. Well, just very briefly, did you make the deal there?

A. That is when we made the arrangement, and Mr. Berg said he would do it for the price he said.

Q. What price was stated?

(Testimony of James H. Corgan.)

A. Well, it was \$150, and then, as I remember, his brother was going with him and we had to pay his brother. [118]

Q. What was that extra price?

A. \$25. It was \$175—that was the price, and he would do the job when the weather was fit, but we had to secure a line.

Q. He told you that he had no towline?

A. Yes. I helped him find a line or secure one that would——

Q. All right. Then, what did you do in reference to the securing of a towline?

A. Well, I believe, as near as I can remember, why, we went to Garibaldi.

Mr. Snow: May I suggest, your Honor, that the witness say “I.” He is speaking of “we.”

Q. (By Mr. Winslow): Whom do you mean by “we?”

A. My father and I and Mr. Boster was in the car and we went over—is that right?

Q. Yes.

A. ——— from there to Garibaldi and talked to Mr. Johnson, Ole Johnson, and found that he could maybe obtain a line from the Coast Guard, which he did, and then——

Q. Did you go with him to see anybody connected with the Coast Guard? A. No.

Q. Who went with him?

A. Nobody. He went alone.

Q. You think he went alone? A. Yes, sir.

(Testimony of James H. Corgan.)

Q. What did you do then about selecting the towline you were [119] to get?

A. Well, when Johnson said it was all right, why, he and I and Mr. Boster went out to the boat house.

Q. Was one of the Coast Guard boys with you?

A. No, we went out there ourselves and inspected the lines that they had and chose the one that was recommended by Mr. Johnson as being the longest and best of all lines.

Q. Where was that towline located in the boat house?

A. It was at the top of the stairs in the loft.

Q. You had seen towlines before, hadn't you?

A. Yes.

Q. How did that towline look to you?

A. Looked pretty good.

Q. Do you remember about what size it was?

A. Well, it was between four and six. Between four and six—four and six inch—it depends on how you measure it.

Q. What would it be, ordinarily, in diameter?

A. It would be about a three-inch line if you go through the center of it.

Q. Three-inch through the center, and nearly four or five in circumference?

A. Yes, in circumference, that is right.

Q. What was done, then, with the line?

A. We went back and told Mr. Berg that we had the line, that we could get the line, so he came down with his boat. I believe [120] it was about 3:00 o'clock he came into the Coast Guard dock, and we played it out the window to him. One Coast Guard

(Testimony of James H. Corgan.)

boy came with us to unlock the shed, and Mr. Bos-ter and I played the line out the window from the upstairs.

Q. Was Mr. Johnson present when the line was loaded?

A. No, he was not present. We put the line out the window and played it out to Mr. Berg and he coiled it on the after deck of his boat.

Q. How did Mr. Berg play it on his boat?

A. Well, it was played over the—He took it right alongside the ramp. There is a ramp right there, right in the water, at which they dock the Coast Guard boats.

Q. What do you mean by “played it out?”

A. Took the line out.

Q. In other words, I am trying to develop whether or not he was there alone in doing it.

A. I believe he was. I think he handled every piece of it.

Q. How long was that line, approximately?

A. I would say between 500 and 600 feet.

Q. That was the day before the tow was begun?

A. Yes. [121]

* * * * *

Mr. Winslow: You may cross-examine.

Cross-Examination

By Mr. Snow:

* * * * *

Q. Having in mind that the disaster occurred

(Testimony of James H. Corgan.)

on November 1st, I wish you would state the date when you, yourself, first approached Mr. Berg about this towage?

A. It was about 11:00 o'clock, I would say about 11:00 o'clock. It was just before lunch on the 31st of October.

Q. It was the day before the towage?

A. Yes, sir.

Q. Was your father with you at that time?

A. Yes, sir.

Q. You had previous acquaintance with Mr. Berg?

A. Yes, sir.

Q. You had been fishing with him?

A. Yes, I had gone out once.

Q. Where did this conversation take place?

A. The conversation took place in his front yard, or in front of his house, in his front yard.

Q. He lives at Bay City?

A. At Barview.

Q. Barview is on Tillamook Bay, is it?

A. Yes, it is right down near the entrance.

Q. Were you present during that entire talk?

A. Yes, sir.

Q. Who did the talking, you or your father?

A. My father and I both talked to him. I talked to him, but, as far as any negotiations, it was done through my father.

Q. At that time, Otto Berg, Jr., asked for \$150 for the towage, plus \$25 for a man, did he?

A. Yes, sir.

Q. Did your father enter into a verbal contract with him? Did your father agree to that?

(Testimony of James H. Corgan.)

A. Yes, he did.

Q. At that time, had you taken any steps to get any hawser for that boat? [131]

A. No, I had taken no steps at all.

Q. Did your father then tell Otto Berg, Jr., that he could get a hawser?

A. We told him we would try to make negotiations for the loan of one.

Q. Did you already have a bridle?

A. Yes, sir.

Q. Where did you get the bridle?

A. The bridle was made up by ourselves, and passed on by Mr. Rathbun.

Q. When did you make up the bridle?

A. Made up the bridle approximately two weeks before.

Q. Before the towage? A. Yes, sir.

Q. How long did the talk with Otto Berg, Jr., take?

A. Oh, it might have taken half or three-quarters of an hour, I am not certain.

Q. Was that the only talk that your father had with Otto Berg, Jr., to your knowledge, prior to their tow? A. Yes, sir.

Q. Just the one?

A. That is the only one, yes, sir.

Q. Was any understanding had at the time of that talk as to when Berg would undertake the towage?

A. Mr. Berg was to use his own judgment as to when he would [132] do the job.

(Testimony of James H. Corgan.)

Q. At the conclusion of that talk, where did you and your father go?

A. Well, I believe we ate lunch and then went back down to Garibaldi.

Q. Did you immediately contact Ole Johnson with the idea of getting this hawser?

A. I approached him and asked him if he knew where we could obtain a hawser.

Q. Where was Johnson at that time?

A. Where was Johnson at that time? I am not sure. I don't know whether it was at his home or on the street where we saw Ole Johnson.

Q. Was that right after lunch?

A. Right after lunch, yes.

Q. On the 31st? A. Yes.

Q. Ole Johnson had recently been discharged from the Coast Guard, has he?

A. A medical discharge, yes, sir.

Q. He was no longer a member of that outfit?

A. No, sir.

Q. Where did he live, Garibaldi?

A. He lives at Garibaldi, Oregon, yes.

Q. You do not remember where it was you talked to him? [133]

A. No, sir. It was in Garibaldi, Oregon, that we talked to him.

Q. Did Johnson say the Coast Guard had some hawsers?

A. He said they possibly would have, yes, sir.

Q. Did he say where they were?

A. No, he didn't say where they were.

(Testimony of James H. Corgan.)

Q. What time was it you actually went to the Coast Guard station to get that hawser?

A. Might I ask: Do you mean when we put it aboard the boat?

Q. Yes.

A. That was about 3:00 or 3:30 in the afternoon; we went to the boat house; we never went to the station.

Q. I understand. The boat house stands on piling down in the bay, doesn't it?

A. Yes, sir.

Q. The boat house is a two-story structure, is it?

A. Yes, sir.

Q. With a ramp leading from the ground floor of the boat house, or the bottom floor of the boat house, down to the water?

A. No—Well, yes, there is.

Q. They haul Coast Guard boats up that ramp to the bottom floor of the boat house?

A. Yes.

Q. That is where they house their boats?

A. Yes.

Q. When taken out of the water? [134]

A. Yes.

Q. After you left Johnson, when did you next see him, after your talk after lunch?

A. I really couldn't say.

Q. Johnson left you to see what he could do about getting a Coast Guard hawser, did he?

A. Yes, sir.

(Testimony of James H. Corgan.)

Q. Did you make an appointment to see him again later than that, later than afternoon?

A. I believe we—He rode up in my car. He rode up to the Coast Guard station and went in. I believe that is the way it was, and he told us afterwards—we never left him until he had gone in. He went in there to the Coast Guard station, came out and he and I and Mr. Boster went down to the boat house and inspected the lines.

Q. That all took place in a short time?

A. At one time, yes, sir.

Q. By "Coast Guard station," you mean the building up on the bank?

A. Yes, the house up on top.

Q. Above the highway? A. Yes.

Q. Then, you went down to the Coast Guard boat house that stands on piling in the water?

A. Yes. [135]

Q. That is where you got the hawser?

A. Yes.

Q. You and Boster and Berg participated in getting that hawser?

A. Yes. I believe—Yes, there was one Coast Guard boy went up to unlock the boat house.

Q. Was that Coast Guard boy Johnson?

A. No, sir.

Q. Do you know the name of that Coast Guard boy? A. No, I have no knowledge.

Q. He was not the head of the station, was he?

A. No.

(Testimony of James H. Corgan.)

Q. Are you acquainted with Boatswain Paris of the Coast Guard Station? A. Slightly, yes.

Q. He was there in command of things, or in command, wasn't he?

A. I understand he was in command.

Q. He did not expressly give you permission to take the hawser?

A. Nobody ever gave us permission, no.

Q. Nobody at all gave you permission?

A. That is right.

Q. When the Coast Guard boy unlocked the door of the boat house, what did Johnson do?

A. Johnson wasn't there at all.

Q. Johnson did not go down there with you at all? [136]

A. He went down before Mr. Berg came. He went and selected the line. Then I went and got Mr. Berg and he came down and he brought his boat from the basin to the boat house. When they put the line aboard, Mr. Johnson wasn't there at all. He was through after we selected the line.

Q. He was through after you selected the hawser? A. Yes.

Q. You made two trips to the boat house?

A. Yes.

Q. On the first trip, the Coast Guard boy let you in the door?

A. Yes. I believe it was the Coast Guard with us then. I am not sure. There is lots of times Mr. Johnson goes in and out of there. He is a machinist and he helps—

(Testimony of James H. Corgan.)

Q. They keep that Coast Guard boat house locked? A. Yes, as a general rule, yes.

Q. You are not sure but perhaps that Johnson himself let you in that first time?

A. I am not certain.

Q. You went along the boardwalk that leads to the ground level of that boat house? A. Yes.

Q. Where they store boats? A. Yes.

Q. Then, you say you climbed upstairs into the loft? [137] A. Yes.

Q. That is the second story of the boat house?

A. Yes.

Q. And you found up there several hawsers, did you? A. I beg your pardon?

Q. You found there several hawsers?

A. Yes.

Q. They were all used? A. Yes.

Q. How many of them were there?

A. Oh, I don't know. There was several lines up there. I know of three. The three best ones were lying right at the head of the stairs.

Q. Three, and there may have been more?

A. There may have been more, yes.

Q. Who was with you? You and Boster?

A. Yes.

Q. Johnson, did he go upstairs?

A. He went upstairs, yes, the first trip.

Q. The first trip? A. Yes.

Q. Did the Coast Guard boy go upstairs?

A. I don't know whether there was a Coast Guard boy with us or not.

(Testimony of James H. Corgan.)

Q. You are not sure he was there? [138]

A. No, sir.

Q. You looked over all the hawsers, did you?

A. Yes.

Q. You made your selection?

A. Well, I am not a judge of hawsers. I thought the best-looking ones——

Q. Who made the selection as between you and Boster?

A. Mr. Boster and I never selected the line. Mr. Johnson selected the line.

Q. He selected the hawser?

A. Yes—or showed us which he thought was the best.

Q. So, you took his word for what he thought was the best hawser, did you? A. Yes.

Q. The hawser was coiled up there, was it?

A. Yes.

Q. How long did that take you?

A. Oh, I don't know, maybe twenty minutes or a half hour.

Q. Then you and Boster and Johnson left there, did you? A. Yes.

Q. And went up to get Berg?

A. Well, yes, Mr. Boster and I went up and got Mr. Berg.

Q. Johnson left you and you did not see him again that afternoon, is that right?

A. No, I didn't. I am certain of that. [139]

Q. Where did you find Berg?

A. Berg was at home.

(Testimony of James H. Corgan.)

Q. At Bay View?

A. Bar View, yes, sir.

Q. Then you brought Berg down to the boat, did you?

A. No, he drove his own car down.

Q. Then he ran his boat over to the Coast Guard boat house?

A. Yes, sir.

Q. Then you and Boster went in again?

A. Yes, sir.

Q. Did anybody have to let you in with a key this time?

A. The Coast Guard boy, yes, sir.

Q. You again climbed up in the loft and you let this hawser out through the window?

A. Yes.

Q. And Berg coiled it on the boat?

A. Yes, sir.

Q. Johnson was not with you that second time?

A. No, sir.

Q. Johnson did not put his hands on any Government property?

A. Not at that time, no, sir.

Q. You considered the Julia D about the same power and equipment as the Faymar, did you?

A. Yes, I understood that.

Q. You are not an expert on towboats? [140]

A. That is right, I am not.

Q. You say you are not? A. No.

Q. Let us discuss now this conference that took place with Mr. Rathbun. Can you fix the date of that conversation?

(Testimony of James H. Corgan.)

A. Oh, no, I can't. It was somewhere right in the middle of October.

* * * * *

Q. Did Mr. Rathbun say that any boat you got would be all right?

A. He said we had to observe the weather and use our own discretion.

Q. He said it did not matter what boat he had?

A. He did not want a skiff. I had an idea that he knew what boat it was.

Q. Did you tell him at that time you intended to borrow a hawser for this towage?

A. No, we did not; didn't even know we would have to.

Q. You did not have in mind at that time you might borrow a hawser for the towage, did you?

A. No, sir.

Q. The only equipment that you owned or that you knew you expected to use was the bridle that you had made?

A. That is right. A towboat usually furnishes their own hawser.

Mr. Snow: That is all.

Mr. Winslow: That is all.

(Witness excused.) [147]

ORVILLE L. BOSTER

was thereupon produced as a witness on behalf of plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

Q. Your full name, please.

A. Orville L. Boster.

Q. Where is your home?

A. My home is in Portland.

Q. How long have you had your home in and about Portland? A. About thirty-five years.

Q. What work are you engaged in now?

A. Pile driving.

Q. Whereabouts?

A. Rockaway. Well, at Wheeler, in fact.

Q. Who is your employer?

A. Mr. Corgan.

Q. What has been your line of work during the past number of years?

A. Operating engineer, leverman on these big dredges.

Q. For whom?

A. For the Port of Portland.

Q. How long did you work for the Port of Portland? A. About sixteen years.

Q. What was the nature of your duties while in that employment? [148]

A. Leverman, engineer.

Q. What kind of work was your outfit engaged in? What kind of work did they do?

(Testimony of Orville L. Boster.)

A. Well, deepening the channel of the river for ships to come through.

Q. Have you had any experience in towing?

A. Not very much.

Q. Where was what you have had?

A. On the Steamer "McCracken," the Steamer "Winona" and the "Pronto."

Q. Here around Portland?

A. On the Willamette River.

Q. You know what a towline is, do you?

A. Yes.

Q. Do you think you know what a good one is or a bad one? A. I do.

Q. In what line of work were you engaged in October, 1945?

A. I was leverman-engineer on the Dredge Wisram.

Q. On Nehalem Bay? A. Yes, sir.

Q. Were you there when the Wisram was towed away from Nehalem Bay by the Julia D?

A. I was.

Q. What kind of a towline did it have? [149]

A. A hemp rope towline.

Q. Approximately how long?

A. Well, I judge around 600 feet.

Q. Approximately how large a line would you call it?

The Court: What are you trying to do, prove it was a good towline? Doesn't he have to prove it was a bad towline?

Mr. Winslow: That is my idea, your Honor,

(Testimony of Orville L. Boster.)

but I am putting on a couple of witnesses as to this line. That is my idea, that he has to prove that. It is up to him to prove it was a bad towline, but, on the other hand, this witness is here.

The Court: Suit yourself.

Mr. Winslow: Well, it may be a little out of order. I will agree to that.

Mr. Snow: I might offer the suggestion that I think it is up to us to show that we had no opportunity to survey the boat.

Q. (By Mr. Winslow): Did you answer the question as to how large it was?

A. About six inches in circumference.

Q. In diameter or circumference?

A. Circumference.

Q. What would you say about that being the ordinary sized towline used in the business generally of towing?

Mr. Snow: Object to that. The witness is not qualified sufficiently to answer. [150]

The Court: Objection sustained.

Q. (By Mr. Winslow): How many towlines have you seen used in business of this kind?

A. Well, quite a good many different kinds.

Q. What sizes? What size a towage would you call this, a small or large?

A. Small towage, light craft.

Q. Do you know what the usual size of a towline is generally used for such a towage? Answer that yes or no.

A. Yes.

Q. What size is generally used?

(Testimony of Orville L. Boster.)

Mr. Snow: The same objection.

The Court: Answer.

Q. (By Mr. Winslow): Answer.

A. Yes, they use a line six inches in circumference, if it is nice weather.

Q. Would you say this was the usual line, the usual size used for towages of this kind?

A. Yes, sir.

Q. What kind of weather was it when this tow was started?

A. Well, it was pretty good weather.

Q. Did you yourself have anything to do with picking out the towline? A. Yes, sir.

Q. Where? [151]

Mr. Snow: Answer that yes or no.

Mr. Winslow: Yes.

Mr. Skulason: Can the witness answer more distinctly?

Q. (By Mr. Winslow): Where did you first see that towline?

A. Upstairs in the Coast Guard station.

Q. Who was with you when you first saw it?

A. Jim Corgan.

Q. How thoroughly up there did you examine this particular towline?

A. Well, we went around up there and we picked out that one as the strongest and newest line.

Q. There were other towlines there?

A. Yes, sir.

(Testimony of Orville L. Boster.)

Q. Did you help load that line aboard the Julia D? A. Yes, sir.

Q. How did you do that?

A. We took it from the coil that was upstairs and put it out through the back window down onto the tug; handed it to the boatman who pulled it aboard.

Q. In the course of the work there, did you see every part of that towline? A. Yes, sir.

Q. In your experience in these matters, what would you say about that particular towline? What kind of a towline was it?

A. A pretty strong line. [152]

Mr. Winslow: You may cross-examine.

Cross-Examination

By Mr. Snow:

Q. Have you ever been a skipper of a tugboat?

A. No, sir.

Q. Or even a deck hand on a tugboat?

A. Yes.

Q. What tugboat have you been a deck hand on?

A. On the Steamer "Winona."

Q. With headquarters in Portland?

A. Yes, sir.

Q. What kind of work was it? What work was a deck hand engaged in? A. Well——

Q. What work was the tug engaged in, I mean?

A. In towing ships and towing dredges up and down the river.

(Testimony of Orville L. Boster.)

Q. In towages of that kind, you are usually alongside?

A. Yes, and sometimes we used headlines, sometimes alongside.

Q. Who was operating the tugboat "Winona" when you were on it? A. Captain Sunday.

Q. How long ago was that?

A. Oh, it was around 1916, I would say. I wouldn't say for sure. [153]

Q. How long did you work on the "Winona?"

A. I just worked there until the regular deck hand came back.

Q. How many days would that be?

A. Oh, I would say two weeks on that boat.

Q. You worked as a deck hand on any other boat? A. I helped on other boats, yes, sir.

Q. But that was practically your only experience in towing? A. Yes.

Q. You never towed on a hawser, did you?

A. No.

Mr. Snow: That is all.

(Witness excused.) [154]

JAMES BRAKEMAN

was thereupon produced as a witness on behalf of plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

Q. Your name is James Brakeman?

A. Yes.

(Testimony of James Brakeman.)

Q. Speak up so the gentleman over there in the corner can hear you. Where do you live?

A. Live at Ocean Park now.

Q. That is over in Tillamook County?

A. Yes.

Q. How long have you lived in Tillamook County? A. About four years.

Q. What has been the nature of your work? What kind of work do you do for a living?

A. Several different kinds. Carpenter work is my trade.

Q. What kind of work were you doing during the month of October, 1945?

A. Working on the dredge.

Q. The Dredge Wishram? A. Yes.

Q. You do not speak loudly enough yet. Where were you working on or about November 1st, when the Wishram was towed from Nehalem Bay? [155]

A. I had come down on this fishing boat, came from Nehalem Bay—we had come down to Garibaldi.

Q. In other words, you were a passenger on this trip on the Julia D? Don't nod your head. Say Yes or No. A. Yes.

Q. What kind of a day was it when you started out?

A. It was a nice day when we started out.

Q. How was the sea and so forth?

A. It seemed to be calm, as much as I know about a sea.

Q. Were you on there as a workman or just as

(Testimony of James Brakeman.)

member who it was, but someone said that one tank went empty when they changed tanks and it refused to start, the motor got hot, it didn't start right quick. I don't recall who said that.

Q. I didn't get the last part.

A. I don't recall who said that, but someone said that.

Q. Someone on the Julia D? A. Yes.

Q. Was the towline broken when the dredge went on the rocks?

A. That I don't know. I don't know whether it was broken [158] or not. We was too far ahead to see whether it was broke.

Q. When you went back there, was it broken?

A. It had been broke or cut, one or the other, but it was not connected when we went back there. Whether it was broke or not, I don't know, because I wasn't there.

Q. Prior to the time you went to get a new towline, you were on the Julia D, weren't you?

A. Before that, yes.

Q. Tell us what took place there just before you went to get a new towline between the crew of the Coast Guard boat and the skipper of the Julia D. I am referring to whether there was an offer to take the tow in charge by the Coast Guard.

A. Yes.

Q. What was said about that?

A. There was. The Coast Guard offered to hook on and tow it across the bar and the Julia D refused to let loose of the tow of the dredge; of-

(Testimony of James Brakeman.)

ferred to let the Coast Guard hook on if he would stay hooked on, too, and the Coast Guard refused.

The Court: What are you trying now, the other case?

Mr. Winslow: I am trying to show that this boat was never wrecked because of any unseaworthiness on our part. I think the Court is two steps ahead of me.

The Court: I am trying to get two days ahead of you. [159] That is what I am trying to do. If we get into that other case, we will be here all week.

Mr. Winslow: You may cross-examine.

Mr. Skulason: Your Honor, on that theory, I should not cross-examine on behalf of the Bergs, should I? I have not said anything so far. I thought we were trying the other case first.

The Court: That is what we are doing, yes.

Mr. Skulason: Then I will not cross-examine.

Cross-Examination

By Mr. Snow:

Q. One or two questions: How many times did that first hawser break?

A. That I couldn't say. I don't remember.

Q. Would you say four times?

A. I don't remember.

Mr. Winslow: I do not see that that is material now. As I understand this witness, the hawer that they are talking about was not on at all at the time she was lost. I don't think that it makes any difference whether it broke twenty times if it was not

(Testimony of James Brakeman.)

the cause of the loss. The hawser that was on there was a different hawser entirely from the one he is talking about. I do not think that is material how many times it broke.

Mr. Skulason: May I ask a question here? Suppose we [160] have to try out the issues between the insurance company and my clients, the Bergs. Suppose we reach that stage in this trial. Then, I should have the opportunity of cross-examining this witness.

The Court: Nothing that has been testified to here can be used in that trial except on stipulation of the parties. I separated the issues at the outset.

Mr. Skulason: That is all right, then, your Honor.

The Court: Be sure you keep your word that you will only ask one or two questions.

Mr. Snow: I asked a question and Counsel objected to it.

Mr. Phillips: I object to it, your Honor.

The Court: He may answer. How many times did it break?

A. That I couldn't say. I don't remember.

The Court: Ask your other question.

Q. (By Mr. Snow): The other question is: Would four times be about right?

A. I wouldn't say because I don't remember how many times.

The Court: You are excused.

(Witness excused.) [161]

FRANCES STEINBACH

one of the plaintiffs herein, was thereupon produced as a witness, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

Q. Your names is Mrs. Frances Steinbach?

A. Yes, sir.

Q. You are the wife of John L. Steinbach?

A. Yes, sir.

Q. How long have you lived around Tillamook, Mrs. Steinbach?

A. I was born in Tillamook and I am sixty years old. I have lived there all my life except for about seven years.

Q. Have you had any other occupation except that of a housewife?

A. I taught school a good many years.

Q. Mrs. Steinbach, skipping a lot of preliminaries, you knew about the Dredge Wishram, did you?

A. I did.

Q. At and before the time it was purchased?

A. I did.

Q. How long had you known Hugh Corgan?

A. Personally, I think I have known him about three or four years.

Q. But your husband has known him——

A. A long time, yes. [162]

Q. Now, at the time the Dredge Wishram was purchased from the Government, or prior to that time, did the Steinbach family have any discussion

(Testimony of Frances Steinbach.)

as to how the title to the Wishram should be taken and held? A. They did.

Q. Just tell the Court what discussion they had.

Mr. Snow: If your Honor please, may I have a continuing objection and exception to all testimony of this character tending to show title by parole?

The Court: It is so understood. Proceed.

A. Shall I go on?

Q. (By Mr. Winslow): Go ahead, please.

A. We met at Dave Steinbach's house, John, my husband John, Dave and Carolyn, and we planned on buying this dredge, the Wishram. We talked it over for quite a while and then we decided that Carolyn and myself should have the Wishram, and it was done for convenience.

The shop had been in the names of John and Dave for years, and we never had had a real good living out of the shop and, so, we thought maybe we could get into something else—if we could get into something else we would have a little bit, maybe we could make a little bit more money than we had in the shop. Not only that, but Dave Steinbach had two boys in the service.

Q. This was all talked over in the family conference? [163] A. Oh, yes.

Q. Go ahead.

A. We had a boy in the service, too, and we thought we could put this in our names, in the women's names, and then, after it got into working order of some sort, then we would probably turn

(Testimony of Frances Steinbach.)

it over to the boys, or some other affair, but it was not done—it was not to be done until after everything was paid off and was in working order.

Q. Then, will you say all four of you agreed then to that plan? A. We did.

Q. Was that plan ever changed?

A. Never.

Q. Have you ladies ever transferred, orally or otherwise, any interest in the Wishram?

A. Never.

Q. What part, if any, then, did you have in securing the insurance on the Wishram?

A. I helped them in money matters.

Q. Who paid the——

The Court: That has all been covered.

Mr. Winslow: I think it has.

The Court: There is no dispute about that.

Mr. Winslow: You may cross-examine. [164]

Cross-Examination

By Mr. Snow:

Q. Mrs. Steinbach, you are familiar with the promissory note that is in evidence as Exhibit 11 attached to Exhibit No. 7? A. I am.

Q. The promissory note in the sum of \$2,925?

A. Yes.

Q. Payable to yourself?

A. Yes, if it is the one that we have—payable to me.

Q. That was the amount of your loan to your husband and Dave Steinbach, wasn't it?

(Testimony of Frances Steinbach.)

A. Something might happen before that, before they get money enough to do that.

Q. If they get money enough, they will pay it?

A. That is what they say.

Q. You testified in Tillamook, didn't you, in this case about a year ago? A. Yes, sir.

Q. I will ask you if you said at that time, in answer to questions from me, as follows.

"Q. This was just a straight loan?"

Mr. Winslow: What page?

Mr. Snow:

"Q. This was just a straight loan to your husband and his brother? A. Yes.

"Q. You made it *before* they were honest men and good business men and you felt they would pay you back, is that right?

"A. Yes.

"Q. And it was an unsecured loan?

"A. Yes, without interest.

"Q. It was just a loan made because of your confidence in their own personal honesty and integrity, is that right? A. Yes, sir.

"Q. And made without interest?

"A. Yes, sir."

Did you testify as I have read there?

A. If it is there, I did. [168]

Q. You helped your husband by keeping the books of the Steinbach Iron Works, didn't you?

A. Yes, sir.

(Testimony of Frances Steinbach.)

Q. Are you familiar with the account in the books of the Steinbach Iron Works under the name of "Frankie"?

A. That is my nickname. That is the name I always go by.

Q. That is your nickname? A. My name.

Q. "Frankie" refers to yourself?

A. Yes.

Q. I will ask you to look at that account. The Bailiff will show you that account. I will ask you if you are not familiar with that?

A. I know what it is.

Q. Perhaps you can testify from memory that it is correct?

A. It is correct; if it is the one I made out, it is correct.

Q. It shows a total loan by yourself to the Steinbach Iron Works of \$2,925, doesn't it, advanced in three different amounts?

A. Whatever is on there.

Q. It shows total payments made of \$1,275, doesn't it?

A. Whatever is there is correct.

Q. It is all correct? A. Supposed to be.

Q. Did you ever have anything to do with the organization [169] of this trust?

A. I did not.

Q. You did not have anything to do with that?

A. No.

Q. At the time of these talks in the family that you were telling about, did they talk about going

(Testimony of Frances Steinbach.)

into business in the name of the trust, the Coast Dredging & Construction, Ltd.?

A. Not at first.

Q. Not at first? A. No.

Q. Did they say anything about dividing the share of that trust three ways between Captain Corgan, your husband and Mr. Dave Steinbach?

A. After things got in working order, they were to do it that way, but Jimmy Corgan was to have two shares, too.

Q. Jim Corgan was to have two and then the rest of the shares were to be divided equally between the three men?

A. Yes, but that was after it was all in working order.

Q. That was talked about during these family talks?

A. It might have been at one or two, but not all the time.

Q. But it was at some of these talks, was it?

A. It was among John and I.

Q. Was it talked about in the family before the dredge was purchased? [170] A. No, sir.

Q. It was not? A. No, it was not.

Q. How long after the dredge was purchased was it talked about? A. I don't know.

Q. How is that? A. I don't know.

Q. You know that they at some time planned to divide the shares in that trust equally between your husband, Dave Steinbach and Captain Corgan, with a few shares to Jim?

(Testimony of Frances Steinbach.)

A. After everything else was fixed up. After all bills were paid back to the Steinbach Iron Works and after everything was cleaned up, why, then it was going to be another working organization.

Q. It was only to take effect after the Steinbach Iron Works had been paid all the money that they had put out on this dredge? A. Yes.

Q. Is that right?

A. Yes, all their working capital and everything that they had put into the dredge.

Q. They put in all the money that went into it, didn't they? A. You know they did not.

Q. What is that?

A. You know they did not put in all the money. I put part of that money in.

Q. Yes, you loaned that money to your husband?

A. I put it in. I loaned it. I didn't know whether I would get it back or not.

A. After everything was all paid up by the Steinbach Iron Works, then they were to go into business, with a division of profits three ways?

A. Yes, sir.

Q. Then you and your sister-in-law were not going to have any share in that trust, were you?

A. We were going to have the share of our husbands. Whatever is my husband's, I have myself. That is the way we figure it among ourselves. We have always figured it that way.

(Testimony of Frances Steinbach.)

Q. Didn't you testify in Tillamook that what was your husband's was yours as well?

A. Why, sure, I suppose so. What is the difference? It is all in the family.

Q. This money you loaned came out of your own school-teaching money?

A. It did. I had a savings account that I put it in.

Q. If this plan had gone through, you and your sister would not have owned that dredge at all?

A. Not afterwards.

Mr. Snow: That is all.

Redirect Examination

By Mr. Winslow:

Q. Counsel brought out on cross-examination that you had kept the books of the Steinbach Iron Works. How long had you kept the books for the Steinbach Iron Works?

A. I know it was twenty-five years anyway, and I never received one cent of pay for that twenty-five years keeping books.

Mr. Winslow: That is all.

(Witness excused.)

(Plaintiffs rest.)

Defendant Universal Insurance Company's
Testimony

EMMETT RATHBUN

was thereupon produced as a witness on behalf of the defendant Universal Insurance Company and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Snow:

Q. Your name is Emmett Rathbun?

A. It is.

Q. Where do you live?

A. I live in Oswego, Oregon.

Q. What is your business or occupation? What is your business connection?

A. I am a partner in the firm of Jewett, Barton, Leavy & Kern.

Q. At the time of the loss of the Dredge Wishram, what was your business connection?

A. I was associated with Addison P. Knapp Co.

Q. Addison P. Knapp Co.?

A. Yes, sir, that is right.

Q. That company, I understand, has been merged into the firm you have just named?

A. That is right.

Q. Are you skilled as a marine surveyor?

A. I have been a marine surveyor—I have done marine surveying work since 1939.

Q. Describe briefly the marine surveying you have done. [174]

(Testimony of Emmett Rathbun.)

A. Before risks in marine lines are written, we survey the boat for seaworthiness and condition and value, and, at the time of accidents, I take charge of the repair work and supervise the salvage, if any, and put the boat in the same condition it was prior to the accident.

Q. What character of craft have you surveyed in the manner you have described?

A. Tugboats, barges, fishing boats, dredges—all types of craft other than the larger ships.

Q. You have not done surveying of the larger ships? A. No.

Q. Have you, to some extent, surveyed ocean-going boats? A. Only fishing boats.

Q. Most of your surveying has been in connection with such craft as operate on the Willamette and Columbia Rivers?

A. That is right, and the Coast waters.

Q. Are you acquainted with an office in Portland known as the Portland Marine Underwriters?

A. I am.

Q. What is your relation, as a surveyor, to that office? A. Well, we do some work.

Q. By "we" you mean yourself? A. I do.

Q. Who constitutes the Board of Marine Underwriters?

A. That is a group of insurance companies in San Francisco, [175] which formed and organized the Board of Marine Underwriters. It is a non-profit organization.

Q. Does the Universal Insurance Company subscribe to that Board? A. I think they do.

(Testimony of Emmett Rathbun.)

Q. Do they have an office in Portland?

A. They do.

Q. Do they do surveying? A. They do.

Q. They have men there skilled in marine surveying?

A. You are talking about the Board of Marine Underwriters?

Q. The Board of Marine Underwriters.

A. Yes.

Q. You are acquainted with Captain Hugh Corgan, are you? A. I am.

Q. Let's go back to June of the year 1945. I will ask you to describe or tell what you know about the original issuance of this policy of marine insurance that is in suit in this case.

A. In general?

Q. In general.

A. That is one that was issued at Coos Bay and brought up?

Q. Yes. Did you take part in any of the negotiations for that insurance?

A. Only in talking to Mr. Corgan. It was turned over to Mr. Knapp and Mr. Banks at Coos Bay for surveying. [176]

Q. A conference has been described here that took place in Mr. Knapp's office in which John L. Steinbach and Mr. Corgan took part, for the purpose of discussing this policy. Did you take part in that conference?

A. There were several conferences. Which one is it?

(Testimony of Emmett Rathbun.)

Q. Well, the conference in which was discussed the particular question of the policy being issued in the names of the two ladies. Did you take part in that? A. I did not take part in that.

Q. Did you have anything to do with fixing the valuation of the Dredge Wishram or surveying her at the time of the inception of the policy?

A. I turned her over to Mr. Banks, as far as his survey was concerned.

Q. Do you recall the towage of the Wishram from Coos Bay to Nehalem Bay?

A. I do, yes.

* * * * *

Q. That takes us down to the trip which you made down to the Coast for the purpose of surveying the dredge. I want you to fix the date of that trip, as nearly as you can.

A. According to my report it was on the 17th of October.

Q. What day of the week was that?

A. Wednesday.

* * * * *

Mr. Snow: That is all.

Cross-Examination

By Mr. Winslow:

Q. Mr. Rathbun, you are positive you were there on October 17th?

A. We were there on a Wednesday. My report says October 17th.

* * * * *

OTTO BERG, JR.

Third Party-Defendant, having been previously duly sworn, resumed the stand and testified as follows in behalf of the defendant:

Direct Examination

By Mr. Snow:

Q. You are Otto Berg, Jr., skipper of the **Julia D** at the time of this towage of the dredge?

A. Yes.

Q. You have already been sworn as a witness in this case? A. Yes.

Q. I call your attention to the negotiations you had with Mr. Corgan about the employment of your vessel for this purpose. I will ask you if at that time Mr. Corgan said anything to you about having approached Mr. Knapp of the Umpqua Chief about this towage?

A. When young Mr. Corgan came to the house to engage me for doing this tow job, the only question of the mention of the Umpqua Chief that came up was when he asked me what I would charge for the job, and I told him I didn't know how much to charge for that job, and I asked him at that time how much the Umpqua Chief would have charged and he said [226] "around \$500."

Now, the reason that I quoted the price of \$150, plus \$25 for a man, was that I was interested in having that dredge work in the moorage basin at Garibaldi. I was interested in building a dock there to go into the fishing business, from the whole-

(Testimony of Otto Berg, Jr.)

sale end of it, and I could not do that without having that basin dredged out, to bring my boat up alongside.

Q. Having reference to the hawser with which you started the towage, how many times did that hawser break?

A. About four times, four or five times.

Q. That was on the towage in question, was it?

A. Yes.

Mr. Snow: That is all.

Cross-Examination

By Mr. Phillips:

Q. That was not the hawser at all that you fastened to the dredge when it went on the rocks, was it? A. No, that was not the one.

Q. The hawser that you are talking about that broke four or five times was not in use at all when the dredge was lost, was it?

A. No, but the question—if that first hawser had been good, the dredge would have been——

Mr. Phillips: Wait a minute. [227]

Mr. Snow: Let him answer.

Mr. Phillips: He is arguing now.

Mr. Snow: I think he asked for it, your Honor.

Mr. Phillips: I asked him if that was the hawser and he said no. He is trying to argue the case, now.

Q. As a matter of fact, you had the hawser that the Coast Guard went in and brought out to you and fastened on with, isn't that right?

A. Yes.

(Testimony of Otto Berg, Jr.)

Q. That hawser did not break before you went on the rocks, did it? A. No.

Q. That hawser was still holding when you went on the rocks, isn't that true?

A. That is right.

Mr. Phillips: That is all.

Mr. Snow: He was unable to complete his answer when Mr. Phillips interrupted him.

The Court: No. We are trying the other case, now.

Mr. Snow: O.K.

(Witness excused.) [228]

ADDISON P. KNAPP

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Snow:

Q. You are Addison P. Knapp?

A. Yes, sir.

Q. You live in Portland? A. Yes, sir.

Q. You were formerly the head of the insurance firm of Addison P. Knapp & Company?

A. That is correct.

Q. Of which Mr. Rathbun was a member?

A. At the time of this loss, yes, he was a junior partner.

(Testimony of Addison P. Knapp.)

Q. That firm is now merged with Jewett, Barton, Leavy & Kern, is it? A. That is correct.

Q. Referring now to your former firm of Addison P. Knapp & Company, did they conduct a marine insurance business or agency in Portland?

A. Conducted a general insurance business. The larger portion of the policies going through our books was marine insurance.

Q. What was your marine insurance connection?

A majority of our business was placed with the firm known [229] as Talbot, Bird & Company, who are managers for several different insurance companies, the Universal Insurance Company and other companies.

Q. Talbot, Bird & Company have offices in San Francisco?

A. They do. The San Francisco office is in charge of their entire Pacific Coast operations.

Q. San Francisco is your correspondent?

A. That is correct. I am not—never have been employed by any insurance company. I am a local agent—what is known as a local agent, reporting through San Francisco.

Q. What is the name of the man who is in charge of the marine insurance department of Talbot, Bird & Company in San Francisco?

A. The Vice-President and General Manager of the Pacific Coast office, with headquarters in San Francisco, is Harry Browne.

Q. I will direct your attention to a date, approximately June 6, 1945, and ask you if you had

(Testimony of Addison P. Knapp.)

a visit at your office from Captain Corgan and John L. Steinbach? A. I did.

Q. Did you know or had you known Captain Corgan before that time?

A. Yes, I had known Captain Corgan for some years.

Q. Had you known Mr. Steinbach before that time?

A. No. That was the first time I had ever met Mr. Steinbach. [230]

Q. Did you confer at that time with these two men? A. Did I what?

Q. Did you at that time confer with these two men?

A. I did, regarding insurance on the Dredge Wishram.

Q. Was there anybody else present at that conference, according to your recollection?

A. Not according to my recollection. There was just the three of us.

Q. Did they make a proposition to you in regard to the Wishram?

A. Yes. They wanted to know what I thought the rate would be, and they explained that the dredge would be laid up at Coos Bay for some little time, and she would then be towed from Coos Bay to Winchester Bay.

I explained to them that I would be very happy to arrange a binder insurance on the dredge at Coos Bay at an open rate, which would probably be three per cent on the agreed value, but that, so far as

(Testimony of Addison P. Knapp.)

the cost of the trip up the Coast, I could not quote on that until after I had referred the matter to San Francisco, and that it could not be referred to San Francisco until the dredge had been surveyed and valued.

Q. You spoke a minute ago of Winchester Bay. Did you mean to say Nehalem Bay?

A. I meant Nehalem Bay. [231]

Q. Was anything said at that time about the name of the towing vessel to make this towage?

A. There was some discussion as to what vessel would make the tow to Nehalem Bay. It is my recollection that Captain Corgan said they were negotiating with a vessel down there that was used as a pilot boat, and I don't know whether he reported that they had already been in negotiation with or probably would negotiate with the owner of the Umpqua Chief.

I told him by all means it would be necessary for him to advise Surveyor Banks what vessel, whether it be the two he had in mind negotiating for or any other, before starting on the towage—before starting on the towage, the name of the vessel would have to be supplied Surveyor Banks, so he could check the condition of the vessel and approve it. In placing the insurance in San Francisco, we would have to report to San Francisco that the dredge and the towing vessel would be approved by the surveyor, Banks, representative of the Board of Marine Underwriters at Coos Bay.

Q. Did Messrs. Corgan and Steinbach accept the conditions that you imposed?

(Testimony of Addison P. Knapp.)

A. Oh, yes. In fact, Captain Corgan said he was familiar with those regulations; he had a very extensive towing experience.

There was some discussion as what would be the proper insurable value of the dredge. It is my recollection that we agreed tentatively on the valuation of \$12,500 for the coverage, during that conference. No policy was issued, but verbally we were bound, with the understanding that whether that value would be the final insurance value would have to be submitted to San Francisco after the dredge had been surveyed.

Q. Did you then ask Mr. Banks to make the survey for you? A. I did.

Q. What survey did you request?

A. I requested a survey of the entire towing venture from Coos Bay to Nehalem Bay of the dredge and whatever towing vessel they would name.

Q. Where those surveys made?

A. They were. Mr. Banks forwarded—I don't know how many copies—the original and several copies to my office and at least one copy of Mr. Banks' report was sent to the Underwriters in San Francisco.

Mr. Snow: I hand the Reporter a paper and ask that it be marked as an exhibit.

(Document entitled "Surveyor's Report" dated June 13, 1945, in re Dredge Wishram, thereupon marked Defendant's Exhibit No. 41 for identification.)

(Testimony of Addison P. Knapp.)

Mr. Winslow: I wish to object to this. It is an instrument [233] executed by Mr. Banks under date of June 13, 1945, so it could not throw any light on the issues in this case.

The Court: It may be received, subject to the objection.

(Document entitled "Surveyor's Report," dated June 13, 1945, signed Robert Banks, thereupon received in evidence and marked Defendant's Exhibit No. 41.)

Q. (By Mr. Snow): Is Defendant's Exhibit No. 41 the report of Mr. Banks' survey of the dredge and tug, the Umpqua Chief?

A. Dated June 13, 1945, yes. This is a signed copy of the report which Mr. Banks sent to me, one or more copies of which were sent to San Francisco.

Q. What action, if any, did you later take on the basis, partly, of the Banks' survey?

A. After I received clearance from San Francisco, and had talked with Mr. Banks and determined that the owners or representatives of the owners had agreed to have the towing done by the Umpqua Chief, I issued a policy of insurance with the Universal Insurance Company, insuring the Dredge Wishram for \$12,500, carrying the further stipulation and an additional premium which extended the coverage for one voyage from Coos Bay to Nehalem Bay.

(Testimony of Addison P. Knapp.)

Q. I wish to take you back to the conference you described in your office. I will ask you if the point was raised at that conference as to in whose names the policy would be [234] written?

A. Oh, yes. That was one of the last matters discussed before the two gentlemen left my office. I said, "Now, when we receive clearance on this matter and the policy is to be issued, in whose name should it be written?" And Captain Corgan said, "Mr. Steinbach will have to answer that," and he furnished the names of the two ladies, Frances Steinbach and—I don't recall the first name of the other Steinbach lady.

Q. Carolyn?

A. That is correct. And I said, "Well, it is rather unusual to insure a piece of equipment such as this in ladies' names. How does it happen it is to be insured in the names of these ladies?" And the reply was that the dredge had been bought or was being purchased in the names of these two women. I made a notation of the two names and when the policy was written those names were used.

Q. Who made that reply as to the manner in which the dredge was to be or had been purchased?

A. John Steinbach.

Q. There is some testimony to the effect that, at the time of the conference, there was in the pocket of John Steinbach or perhaps Captain Corgan, a letter from the Corps of Engineers, trans-

(Testimony of Addison P. Knapp.)

ferring that dredge to Captain Corgan. Was that letter exhibited to you at that meeting? [235]

A. No, that letter was not exhibited to me.

Q. Were the contents of the letter stated to you verbally at the meeting? A. They were not.

Q. Had they, that is, Mr. Steinbach and Mr. Corgan, told you at that meeting that the dredge had been transferred from the Government Engineers to Mr. Corgan, would you have issued the policy of insurance covering the dredge in the names of the ladies?

A. No, I would have told them that the proper way to insure the dredge would be in the name of whoever might hold title to it.

Q. Did either Mr. Corgan or Mr. Steinbach tell you at that time that the Steinbach Iron Works had paid any money for the purchase of the dredge or furnished money for the purchase of the dredge?

A. They did not.

Q. Did either one of them tell you that the reason that that insurance—the reason they were insuring the dredge in the names of the ladies was to keep the money away from the creditors of the Steinbach Iron Works?

A. They did not. They simply said the dredge was being purchased in the names of the women, with their money.

Q. Did either of these gentlemen explain to you at that time about the purpose to organize a trust called the Coast [236] Dredging & Construction, Ltd., in which the two Steinbachs would have ap-

(Testimony of Addison P. Knapp.)

proximately 32 per cent each and Captain Corgan would have about the same amount and Captain Corgan's son would have 4 per cent?

A. They did not.

Q. They did not tell you about that plan to go into business together?

A. No mention made of it at all.

Mr. Winslow: I think the Court has been very liberal. I won't object to them telling what they did, but I think that ought to be sufficient. To ask what they did not say might take all afternoon on that one proposition.

Q. (By Mr. Snow): When did you finally learn that the two ladies did not own the dredge?

Mr. Winslow: We will object to that as calling for a conclusion of the witness.

Mr. Snow: I think, your Honor, that is of some importance in this case.

Mr. Winslow: Assuming something.

Mr. Snow: I think it is important, your Honor.

The Court: Answer.

A. I did not learn until some time after the accident. I believe I first learned the dredge was not owned by the women from you, after you had made some investigation of this matter. [237]

Q. Do you recall the application for the extension of this towage, the extension of this policy, rather, by endorsement to cover the towage from Nehalem Bay to Tillamook Bay?

A. I remember Mr. Rathbun told me that such

(Testimony of Addison P. Knapp.)

an application had been made to him over the long-distance telephone.

Q. Did he tell you at that time what he said— Did he tell you what had been said about the towing vessel?

A. Yes. We had a discussion of a few minutes' duration, during which he told me that the towing arrangements would be the same for the trip from Nehalem Bay to Tillamook Bay as had prevailed during the trip from Coos Bay to Nehalem Bay, namely, the dredge would be boarded up and the towing would be done by the Umpqua Chief.

Q. Did you know about Mr. Rathbun's survey of the dredge after that time?

A. Did I what?

Q. Did you know of Mr. Rathbun's survey of the dredge after that time? A. Oh, yes.

Q. Did anybody ever tell you that the towage from Nehalem Bay to Tillamook Bay would be made by the Faymar or the Julia D or some other similar vessel?

A. No. The only information I had on how the towing would be done was the original conversation I had with [238] Mr. Rathbun, in which he reported this telephone conversation with Captain Corgan and, after he had been down and made the survey, his written report stated that he approved the tow being made by the Umpqua Chief.

Q. Had any disclosure been made to you—
... The Court: Is that the report in evidence, the

(Testimony of Addison P. Knapp.)

one just received? Is the report just referred to in evidence?

Mr. Snow: His report in evidence?

The Court: Yes.

Mr. Snow: I have not put it in evidence. I will offer it in evidence, the survey made by Mr. Rathbun of the Dredge Wishram.

Mr. Winslow: That will be No. 42.

Mr. Snow: Yes.

The Court: Admitted.

(Signed copy of report of Emmett Rathbun, Marine Surveyor, in re "Suction Dredge Wishram," thereupon received in evidence and marked Defendant's Exhibit No. 42.)

Q. (By Mr. Snow): Had disclosure been made to you that the Julia D or the Faymar or some similar vessel would undertake the tow of the Wishram from Nehalem Bay to Tillamook Bay, would you have issued the endorsement that you subsequently issued, or what would have been your position?

A. My position at that time of the year—it was late in [239] the season for outside towing—would have probably been to tell the owners or their representatives that we could not insure the risk in the tow of a fishing vessel, unless that vessel were approved by a representative of the Board of Marine Underwriters in San Francisco, or a correspondent of the Board of Marine Underwriters. However, I might not have gone that far because

(Testimony of Addison P. Knapp.)

with over twenty years' experience in the marine insurance business I would have probably known that no qualified surveyor would approve a fishing vessel without power, towing gear on it for outside work, late in the season, if at all.

Q. Did anybody tell you, before this endorsement was issued by you, that the towage would be attempted by the use of a hawser taken from the loft of the Coast Guard boat station?

A. No, the only information I had was to the effect that the towage would be done by the Umpqua Chief, and I knew from the previous trip that she had her own towing gear which was furnished for that trip and would undoubtedly use that gear on the return trip to Tillamook Bay.

Q. If disclosure had been made to you that the towage would be made by a hawser taken from the loft of the Coast Guard boat station at Garibaldi, what would have been your position?

A. I would undoubtedly have insisted upon the Board of Marine Underwriters' survey of the entire venture. The only thing that we had to check on, so far as I knew at the time [240] I requested Mr. Rathbun to go down and make the survey, was information in my possession that the tow was to be made by the Umpqua Chief and the only thing that had to be checked was whether or not the dredge was taking any water and whether or not she was boarded up. Mr. Rathbun, with years of small vessel experience, was perfectly qualified to pass on those matters.

(Testimony of Addison P. Knapp.)

Q. What is the reason why you would have insisted on a Board of Marine Underwriters survey of a new vessel and equipment for a towage such as this?

A. The main reason is because, in arranging either a new policy or new conditions to a policy previously issued with the San Francisco Underwriters, if the towing vessel or the article or equipment to be towed is something that has not previously been surveyed and approved by representatives of the Board of Marine Underwriters, they will not grant the coverage.

Q. Why wouldn't they grant the coverage?

A. Because, it is a standard requirement of the Underwriters to have any towing vessel and piece of equipment and equipment to be towed surveyed by a representative of the Board of Marine Underwriters.

Q. Would it make any difference, the fact that the tow was to be very short, only five to eight miles, over a bar at each end? [241]

A. As long as there is any outside towing involved, passing over a bar and crossing another, where the vessel has not previously been approved by the Board of Marine Underwriters in San Francisco, the Board of Marine Underwriters in San Francisco always require a survey by a representative of the Board of Marine Underwriters or a correspondent of the Board of Marine Underwriters.

Mr. Snow: That is all. You may cross-examine.

(Testimony of Addison P. Knapp.)

Cross-Examination

By Mr. Winslow:

Q. Mr. Knapp, you say the first information you had that these plaintiffs were not the owners of the dredge was information given to you by Mr. Snow.

A. I said I believe it was information I had.

Q. Whom did Mr. Snow tell you owned it?

A. I don't know that I can answer—I don't know that I can recall.

Q. Did he say they did not own it and leave it that way?

A. As near as I can recall the conversation, he said that that dredge originally had been transferred, so far as he could ascertain from the records, to Captain Corgan.

Q. You took it from that Captain Corgan was the owner of the dredge, did you?

A. This all took place long after the loss.

Q. I know, but you took it from that that Captain Corgan [242] was the owner of the dredge?

A. I assume I did.

Q. Did Captain Corgan claim to be the owner of it when the insurance policy was issued?

A. No, he did not.

Q. How is that? A. He did not.

Q. You knew he did not claim to be the owner of it. Did you ask him—did you argue the thing with Mr. Snow when he said that, or just let it go at that?

A. There was no occasion for me to argue with Mr. Snow about it.

(Testimony of Addison P. Knapp.)

Q. All right. Going back to the time when the policy was issued, you say you told Mr. Steinbach and Mr. Corgan that it was kind of peculiar to issue a policy of this nature in ladies' names?

A. I don't know as I used the word "peculiar." I think I said "somewhat unusual."

Q. I think you used the word "peculiar" before.

A. If I used "peculiar," I would prefer the word "unusual."

Q. Did Mr. Steinbach tell you they were buying the dredge in the names of the ladies?

A. Mr. Steinbach told me that.

Q. Did you make any further inquiry about it?

A. I did not. In the insurance business we make a custom [243] of accepting information of that sort.

Q. I didn't get part of that.

A. In the insurance business we make it a practice to accept such statements at their face value.

Q. You say in these negotiations for moving the dredge from Nehalem Bay to Tillamook Bay you relied considerably upon Emmett Rathbun's report, did you? A. Yes.

Q. To permit the towing or, rather—strike the "permit"—extend the insurance to cover the trip from Nehalem Bay to Tillamook Bay?

A. Nehalem to Tillamook?

Q. Yes.

A. Yes. I at least saw his report and read it.

Q. And studied it, of course, did you?

(Testimony of Addison P. Knapp.)

Q. How do you know you had that report in your files before the accident?

A. Well, because I would not have issued the endorsement [246] permitting the trip up without having a survey report on it.

Q. Let us take that, now. When did you issue the endorsement?

A. If my memory serves me correctly, it was dated October 24, 1945.

Q. What did you do with it when you issued it?

A. I apparently dictated a letter addressed to Captain J. H. Corgan at Garibaldi, Oregon—on what date that letter was dictated I can't say, but apparently she mailed it on October 30th.

Q. The letter is dated October 30th, too?

A. That does not necessarily mean that it was dictated on October 30th. Our letters are always dated the date on which they are typed.

Q. You think your secretary was six days behind in sending out these riders?

A. Very possible. We have had a change in office help. As anyone who has had experience in operating an office in the City of Portland knows, at least during the years 1943, 1944, 1945 and 1946, office help was quite a problem.

Q. You were particularly anxious that this tow be as early as possible. It was getting late, wasn't it?

A. Getting late, certainly.

Q. Yet you held the rider six days there in the office after it was prepared? [247]

A. It apparently was not mailed out for six days.

(Testimony of Addison P. Knapp.)

It was not purposely held in the office, I can assure you of that.

Q. Why did you wait until October 24 before you issued it? A. 24th?

Q. 24th.

A. I assume this survey report of Mr. Rathbun's was not typed until October 24th. That would be a logical explanation.

Q. I think his testimony was that he made the survey on October 17th.

A. That does not mean the report was typed on October 17th.

Q. You were in a hurry to get this tow over with, weren't you?

A. The tow was to be made only in good weather. We had already agreed to insure the boat after October 15th deadline, so the main thing was not the matter of hurry; it was a matter of getting it done in good weather.

Q. In other words, you do not think they needed a rider to make the tow?

A. Not after we told them we would insure the vessel.

Q. Is it your understanding they did not need this rider before they would be authorized to go ahead with the tow? Answer. You are certainly entitled to make any explanation you may want to make, but I thought you were going to say something else. [248]

(Question read.)

(Testimony of Addison P. Knapp.)

any given date, without looking in my files. I don't know whether there is anything in the files. I assume that probably is the correct date.

Q. When they left your office on the day that they did come in there, you knew all about the loss of the Dredge Wishram, didn't you?

A. Certainly.

Q. You knew that it had been towed by the Julia D?

A. Yes, I did.

Q. You knew the Umpqua Chief had not been used, didn't you?

A. Yes, I did.

Q. When did the report go to San Francisco, the report that she was a total loss?

A. The report that she was a total loss?

Q. Yes.

A. Oh, not for some little time after the loss. I do not believe the matter was reported to San Francisco until after Rathbun had rendered his report of investigation down there. I am not certain of that, but I know there was some time lag from the time of the loss until it was reported to San Francisco. [251]

Q. I think the report of Mr. Rathbun is here in evidence, but I do not recall the date. Do you recall the date?

A. No, I don't.

Mr. Winslow: My associate says there is no date on it, so we won't go into that any more.

The Court: When do we hear about the checks? What about it? Why were they cashed afterwards?

Q. (By Mr. Winslow): Tell us, then, why was it that Plaintiffs' Exhibit No. 33, the check for

(Testimony of Addison P. Knapp.)

\$187.50, was cashed by your office on November 8th, if you knew all about the Umpqua Chief did not do the towage?

A. The check, I believe, was received in my office on October 31st, was passed immediately to my bookkeeper who handled all the bank depositing by rubber stamp. I believe you will find the rubber stamp on that. Am I not correct?

Q. Yes, that is correct. You may see the exhibit, if you want to.

The Court: What was the premium for that tow?

Q. I neglected to ask you about a line in your re-been \$1,250, as I recall it.

Q. (By Mr. Winslow): Advance \$187.50, is that it?

A. That is the premium in the event there is no loss. This is what the premium would have been in the event there is no loss. There are two things involved. Just as I say, this [252] is the method that we use for depositing checks. This check is passed to my bookkeeper on October 31st and presumed to have been taken to the bank on that day. I do not make a practice of checking the cash book and cash account every night. I presumed this check had been deposited prior to the loss.

Q. Did you ever ask her why she waited until November 8th to cash that check?

A. I believe I asked her some time later when the matter was discovered.

(Testimony of Addison P. Knapp.)

Q. She is available here, isn't she? She is here, is she not, to testify? A. Yes.

The Court: Was not the premium from Coos Bay paid in advance?

Mr. Winslow: Yes.

The Court: Why wasn't this paid in advance?

Mr. Winslow: It was. It was paid before the tow.

The Court: There is a flat premium from Coos Bay, paid in advance.

Mr. Winslow: Yes, the premium paid at Coos Bay.

A. The premium from Coos Bay, on the northern trips was paid, the full \$1,250.

Q. (By Mr. Winslow): Was the—was it customary to pay the full premium in advance? [253]

A. There is no particular custom on that. Sometimes the full premium is paid and sometimes not.

Q. It is satisfactory to the company to pay it like this was paid?

A. Well, if they are to recover on the policy, there would be due the difference between \$1,250 and the amount of this check.

Q. Yes, but all the requirements of the insurance company were that the \$187.50 was to be paid on this particular premium. Wasn't that right?

A. I don't think that there was any requirement discussed as to the payment of the premium.

Q. In other words, it would have been all right if they had towed the dredge without payment of any part of the premium?

(Testimony of Addison P. Knapp.)

A. That is correct.

Mr. Winslow: That is all.

Mr. Snow: No redirect examination.

(Witness excused.) [254]

Mr. Winslow: Plaintiffs' Exhibit No. 37, if the Court please, is a statement from the insurance company for the payment of the premium \$187.50 under date of October 24th, and shows the full amount of the premium and the amount to be paid.

Mr. Snow: If the Court please, may I have leave to put Mr. Rathbun back on the stand to ask him one or two more questions?

The Court: All right.

EMMETT RATHBUN

produced as a witness on behalf of the defendant Universal Insurance Company, having been previously duly sworn, was recalled and was examined and testified as follows:

Direct Examination

By Mr. Snow:

Q. I neglected to ask you about a line in your report, in your survey of the Dredge Wishram, that the Dredge Wishram was owned by Captain Corgan. How did that statement come about?

A. Only that Corgan was in the office and I was dealing with him. I really never looked at the papers on the Wishram to see who owned it at all.

Mr. Snow: That is all.

(Witness excused.) [255]

WENDELL WYATT

was thereupon produced as a witness on behalf of defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Snow:

Q. Mr. Wyatt, you are an attorney-at-law, are you? A. Yes.

Q. A member in good standing of the Oregon State Bar? A. Yes.

Q. You practice in Astoria? A. Yes.

Q. You were formerly a resident of Portland?

A. Yes.

Q. Did I employ you, in the early part of 1946, to take a trip down the Coast to make some investigation of the loss of the Dredge Wishram?

A. Yes.

Q. In the course of that, did you have a conversation with Mr. Otto Berg, Jr.?

A. Yes, sir, I did.

Q. Did he deliver to you what purports to be a piece of the hawser which parted several times in towing the Wishram? A. Yes, it did.

Q. Have you got that with you?

A. I do have. [256]

Mr. Snow: There was a defendant's pre-trial exhibit number reserved for that. I offer that in evidence.

Mr. Phillips: Objected to as incompetent, irrelevant and immaterial; it has not been properly iden-

(Testimony of Wendell Wyatt.)

tified, and it has no bearing on this case because the testimony is that was not the hawser that broke and, if that was not the one that broke, it did not have anything to do with the dredge going onto the rocks.

The Court: I suppose there are ways of identifying it.

(Piece of hawser thereupon received in evidence and marked Defendant's Exhibit No. 20.)

Q. (By Mr. Snow): You have another piece of hawser. What does that purport to be?

A. It purports to be a piece of the hawser that was used in the towage when the Tug Umpqua Chief towed the Dredge Wishram from Coos Bay to Nehalem Bay.

Q. Where did you get that piece?

A. I got this piece from Lloyd Knapp in Coos Bay in February, 1946.

Mr. Snow: I want to offer that in evidence, but I will ask you another question. There might reasonably be an objection to this question on the part of counsel.

Q. Did you consult Mr. Lloyd Knapp on that trip? A. Yes, sir. [257]

Q. What, if anything, did Mr. Knapp tell you about the arrangement or attempted arrangement with Mr. Corgan about the towage of the Dredge from Nehalem Bay to Tillamook?

Mr. Winslow: I think that is going a little too far, your Honor. I think that is pure hearsay.

Mr. Snow: Your Honor, this would be hearsay

(Testimony of Wendell Wyatt.)

testimony. After all, it was shown by the testimony that Mr. Lloyd Knapp died.

The Court: Is there anything very vital? Does the statute authorize this?

Mr. Phillips: No.

Mr. Snow: This is no solemn declaration in apprehension of death.

The Court: Objection sustained.

Mr. Snow: That is all.

(Witness excused.) [258]

OTTO BERG, JR.

having been previously duly sworn, was recalled as a witness on behalf of defendant and further testified as follows:

Direct Examination

By Mr. Snow:

Q. Referring to Exhibit No. 20, that piece of hawser which was brought in by Mr. Wyatt, is that the hawser that you started the towage with? Is that a piece of it?

A. That is a piece of it.

Q. You gave it to Mr. Wyatt, did you?

A. Yes.

Mr. Snow: That is all. I offer in evidence Pre-Trial Exhibit No. 20.

Mr. Phillips: Object to that on the ground it has no bearing on the case at all, in any way, shape or form.

The Court: Admitted, subject to the objection.

(Exhibit heretofore received in evidence.)

DEFENDANT'S EXHIBIT No. 7(3)

No. 89347

Assumed Business Name Certificate

Hugh Corgan, J. H. Corgan to Coast Dredging & Construction, Ltd. Assumed Business Name Certificate.

Know all men by these presents, that the real and true names and postoffice addresses of the persons conducting, having an interest in, or intending to conduct the business of Coast Dredging & Construction, Ltd. An estate in Joint Tenancy under the name or style of Coast Dredging & Construction, Ltd., at Tillamook, County of Tillamook, State of Oregon, are the following, to-wit:

Hugh Corgan, Postoffice address, Tillamook, Oregon; J. H. Corgan, Postoffice address, Tillamook, Oregon.

Witness our hands and seal this 23rd day of July, 1945.

[Seal]	H. CORGAN,
[Seal]	J. H. CORGAN.

Seals not scrolled.

Executed in the presence of J. G. Vollmer.

(Testimony of Wendell Wyatt.)

testimony. After all, it was shown by the testimony that Mr. Lloyd Knapp died.

The Court: Is there anything very vital? Does the statute authorize this?

Mr. Phillips: No.

Mr. Snow: This is no solemn declaration in apprehension of death.

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Witness our hands and seal this 23rd day of July, 1945.

[Seal] H. CORGAN,

[Seal] J. H. CORGAN.

Seals not scrolled.

Executed in the presence of J. G. Vollmer.

State of Oregon,
County of Multnomah—ss.

Be It Remembered, that on this 23rd day of July, 1945 before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Hugh Corgan and J. H. Corgan who are known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and Notorial seal the day and year last written.

FRED F. SEXTON,
Notary Public for
State of Oregon.

My commission expires 1/15/49.

Filed for record on the 28th day of July A. D.
1945 at 8:40 o'clock a.m.

ESTHER LOCKE,
County Clerk.

By VELEDE ABRAMS,
Deputy.

Recorded in Assuming Business Record 2, Page
427-8.

State of Oregon,
County of Tillamook—ss.

I, Esther Locke, County Clerk and ex officio Clerk of the County Court of the County and State aforesaid, do hereby certify that the foregoing copy of Assumed Business Name Certificate: Hugh Corgan J. H. Corgan to Coast Dredging & Construction, Ltd., has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record at my office and in my custody.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of June, 1946.

[Seal] /s/ ESTHER LOCKE,
Clerk.

ADD. ISS.		NAME	
Dredge Acct. #4		Wishram	
MEMO	TERMS	ACCOUNT NO.	SHEET NO.
DATE	ITEM	FOL	CREDIT
May 28	Expense to Portland # 3808	25	
" 31	Borrowed from Frankie	1000	
June 6	" " "	675	
6	Cash from Iron Works	3825	
8	Expense to Cass Bay # 3832	40	
17	J. H. Corgan # 3842	100	
12	" " # 3848	300	
14	Till. Port. Truck Exp. 3894	162	
20	" " " " 3888	17622	
23	From Frankie (b. exp.)	1250	
29	Till. Port. Truck 3941	16306	
28	Corgan 3913	50	
July 7	Freight	1640	
12	Willetts from Ship Bldg # 3958	12676	
20	J. L. Vollmer (b. exp.) # 3976	9915	
		800859	
			41574

PLAINTIFFS
DEFENDANTS
EXHIBIT 7(4)
Case No.
IRA G. HOLCOMB
Reporter

DATE	ITEM	FOL	DEBIT	DATE	ITEM	FOL	CREDIT
July 28	Corgan # 3996		6775				11574
28	" 3997		8225				
Aug 8	" 4015		150				
8	" 4016		75				
10	" 4020		450				
20	" 4035		250				
July 6 - Aug 3	paid for men's wages from ship		24388				
			932747				
	Work done in July, Aug. Sept. Oct.		10837		for - pd by Dredge Co.		20837
	Work done on cutter in Oct.		53453				
			1007037				62411

10107037
62411
944636

MEMO	TERMS	LIMIT	ACCOUNT NO.	SHEET NO.

NAME ADDRESS

PLAINTIFFS
DEFENDANT'S

EXHIBIT 7(11)

Case No. 3087

IRA G. HOLCOMB, Jr. 45

Re, order

2925 00

For value received, We promise to pay to Frances M. Steinbach
or order Two thousand nine hundred twenty five 00 DOLLARS,
in lawful money of the United States of America, of the present standard value, with interest thereon in like law-
ful money at the rate of _____ per cent per _____ from date until paid, payable in _____
installments of not less than \$ _____ in any one payment, together with the full amount of interest due
on this note at time of payment of each installment. The first payment to be made on the _____ day
of _____ 19____, and a like payment on the _____ day of _____
thereafter, until the whole sum, principal and interest has been paid, if any of said installments are not so paid, the
whole of said principal sum and interest to become immediately due and collectible. And in case suit or action is
instituted to collect this note, or any portion thereof, We _____ promise to pay such additional sum as the
Court may adjudge reasonable as attorney's fees in said suit or action.

Due _____ 19____

At Tillamook, Oregon

No. _____

*Tested and sworn to
by J. H. Steinbach
D. Steinbach*

INSTALLMENT NOTE No. 181. The J. K. Gill Co., Portland, Oregon

ADDRESS		NAME		TERMS		LIMIT		ACCOUNT NO.		SHEET NO.	
Box #14 CHILL		Frankie									
DATE	ITEM	FOL	V	DEBIT	DATE	ITEM	FOL	V	CREDIT		
May 31	Borrowed from Frankie			1000	May 17	Cr. by Ch from Knapp			415 75		
June 1	"			675	Aug 17	Cr. by " #84			509 30		
" 23	"			1250	Sept 20	" " " #145 by Frankie			925		
				2925	Oct 20	" " " #225 for Carpenter			150		
				1657					200 -		

PLAINTIFFS
DEFENDANTS

EXHIBIT 7(14)

CASE NO. 3087

IRA Q. HOLCOMB
Reporter

PLAINTIFFS
DEFENDANT'S

EXHIBIT 7(14)

Case No. 3087
IRA G. HOLCOMB
Reporter

DEFENDANT'S EXHIBIT No. 13

Tillamook, Oregon, May 31, 1945.

J. H. Corgan
Portland, Oregon

Dear Hugh:

Enclosed is draft for one thousand dollars. In line with what was talked yesterday it is our understanding that we will form a corporation with you, Dave, and I each holding one third of the stock. Your son, Jimmie, will be given a share of stock by each of us although in order to make it come out right he should have four shares which would leave 32 shares to each one of us.

Dave is going to Wheeler and Nehalem this afternoon. Lewis was in the shop this morning. He didn't remember you but it was his son that went to school with Jimmie is the one that turned up missing when the cruiser Houston was sunk by the Japs.

Lewis is right up against it for dredging now. At low tide he can't get his logs in. We have been wondering if it might be wise to tow the dredge right in to our shop where she can be fitted with the cutter and tried out and then used here at Wheeler for a short period before taking her to Toledo. That is why Dave is going to Nehalem this afternoon to see if enough work could be lined up there to take several months.

Think it over. I know the first cost of towing clear to Tillamook would be higher than taking her

to Toledo but on the other hand if she was given a work out here it might saved us a lot rather than have to run back and forth between here to Toledo.

Very truly yours

J. L. STEINBACH.

DEFENDANT'S EXHIBIT No. 14

"The Steinbach Iron Works"

Certificate of Assumed Business Name. No. 34913

Know All Men By These Presents: That J. L. Steinbach and D. E. Steinbach are engaged in business in the city of Tillamook, in the County of Tillamook and State of Oregon, under the assumed business name "The Steinbach Iron Works,".

That the true and real names and Postoffice adressesses of the only persons conducting, or having an interest in the said, "The Steinbach Iron Works, are as follows: J. L. Steinbach, whose Postoffice address is Tillamook, Oregon, and D. E. Steinbach, whose Postoffice is Tillamook, Oregon,

J. L. STEINBACH

D. E. STEINBACH

State of Oregon,
County of Tillamook—ss.

On this 15th day of November, A.D., 1920, personally came before a Notary Public in and for said County and State, the within named J. L. Steinbach and D. E. Steinbach, to me personally known to be

the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein named.

Witness my hand and Notorial seal this 15th day of November, 1920.

C. W. BARRICK,

Notary Public for Oregon.

My commission expires Nov., 14th, 1923.

Filed for record November 16, 1920 A.D. at 1:15 P.M.

[Seal]

HOMER MASON,

County Clerk.

By BERNICE E. RIPLEY,

Deputy.

State of Oregon,

County of Tillamook—ss.

I, Esther Locke, County Clerk and exofficio Clerk of the County Court of the County and State afore-said, do hereby certify that the foregoing copy of Certificate of Assumed Business Name from J. L. Steinbach, D. E. Steinbach to "The Steinbach Iron Works" has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the name appears of record at my office and in my custody.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said Court this 21st day of June, 1946.

[Seal] ESTHER LOCKE,
Clerk.

By /s/ IRENE PARTRIDGE,
Deputy.

PLAINTIFFS' EXHIBIT No. 21

[Letterhead, War Department, Office of the
District Engineer]

25 May 1945.

Captain Hugh Corgan,
2944 N. E. 68th Street,
Portland, Oregon.

Dear Sir:

Your offer of \$5,500.00 for the Dredge "Wishram" and equipment, as is, where is, Kruse & Banks Shipyard, North Bend, Oregon, is hereby accepted.

Upon receipt of your certified check for the above amount, made payable to the Treasurer of the United States, you will receive a letter authorizing delivery of the plant to you.

For the District Engineer:

 /s/ HORACE H. PERSON,
 Captain, Corps of Engineers,
 Executive Officer.

cc: Resident Engineer,
U. S. Engineer Office,
Empire, Oregon.

PLAINTIFFS' EXHIBIT No. 22

[Letterhead, War Department, Office of the
District Engineer]

6 June 1945.

Captain Hugh Corgan,
2944 N. E. 68th Street,
Portland, Oregon.

Dear Sir:

Receipt is acknowledged of your certified checks for \$1,000 and \$4,500, full payment for the Dredge "Wishram" and equipment at the Kruse & Banks Shipyard, North Bend, Oregon.

Upon presentation of a copy of this letter to the Resident Engineer, U. S. Engineer Office, Empire, Oregon, he will deliver to you or your authorized representative, the property comprising the sale.

Very truly yours,

/s/ HORACE H. PERSON,

Captain, Corps of Engineers,
Executive Officer.

PLAINTIFF'S EXHIBIT No. 25

[Letterhead Addison P. Knapp Co.]

October 17, 1945

Captain Hugh Corrigan
General Delivery
Rockaway, Oregon

Dear Captain:

Emmett Rathbun has requested me to give you a quotation for extending the hull insurance policy covering the dredge "Wishram" while moving from Nehalem Bay to Tillamook Bay.

Generally speaking the marine underwriters will not cover outside trips of this nature after October 15. However, in view of the sort run I will take the responsibility of granting the coverage at 10 per cent, to return 8½ per cent upon safe arrival; if you will pick the weather and only make the trip when conditions are entirely safe.

It would of course, be necessary for us to have the dredge surveyed before she leaves Nehalem Bay so if you wish the protection, kindly advise in advance so that necessary arrangements can be made with a qualified surveyor.

Yours very truly,

/s/ ADDISON P. KNAPP.

APK:td

PLAINTIFFS' EXHIBIT No. 26-A

[Envelope]: From Addison P. Knapp Co., General Insurance, Suite 620 Henry Building, Portland 4, Oregon, to Captain J. H. Corgan, General Delivery, Garibaldi, Oregon.

[Postmarked]: Portland, Oreg., Oct. 30, 6:30 p.m. 1945.

This letter delivered to D. E. Steinbach on Nov. 7, 1945, 9:00 a.m., at General Delivery. Sanford S. Partridge, P. M.

PLAINTIFFS' EXHIBIT No. 26-B

[Letterhead Addison P. Knapp Co.]

October 30, 1945

Captain J. H. Corgan
General Delivery
Garibaldi, Oregon

Dear Capt. Corgan:

In accordance with your recent instructions, we are sending you herewith endorsement applying to Universal Policy PC 50295 extending it to cover one trip of the Dredge "Wishram" while being towed from Nehalem Bay to Tillamook by the tug "Umpqua Chief".

Surveyor Rathbun has approved this tow only if made during calm weather. Under the circum-

stances, I trust you will be very careful in picking the weather for the trip.

Yours very truly,

/s/ ADDISON P. KNAPP.

APK:td

Encl.

PLAINTIFFS' EXHIBIT No. 26-C

Endorsement

Suction Dredge "Wishram"

For and in consideration of an additional premium of \$1250 the within policy is hereby extended to cover one trip from Nehalem Bay to Tillamook Bay in tow of the tug "Umpqua Chief". In event of safe arrival of the insured dredge at Tillamook Bay and no claim resulting from damage sustained during voyage insured by this endorsement the Assureds shall be entitled to a return of \$1062.50 from the Underwriters.

After arrival at Tillamook Bay insured dredge shall be warranted confined to the waters of Tillamook Bay and its tributaries.

All other terms and conditions of this policy remaining unchanged.

This slip is attached to and forms part of Policy No. PC 50295 of the Universal Insurance Company issued to Frances M. and Carolyn S. Steinbach. Dated at October 24, 1945.

ADDISON P. KNAPP CO.,

/s/ ADDISON P. KNAPP.

PLAINTIFFS' EXHIBIT No. 27-A

[Envelope]: From Addison P. Knapp Co., General Insurance, Suite 620 Henry Building, Portland 4, Oregon, to Mrs. Frances M. Steinbach, Mrs. Carolyn S. Steinbach, Steinbach Blacksmith & Machine Shop, Tillamook, Oregon.

[Postmarked]: Portland, Oreg., Nov. 30, 6:30 p.m., 1945.

This envelope contain check No. 6267 from Addison P. Knapp Co. together with letter date Nov. 30, 1945.

/s/ D. E. STEINBACH.

PLAINTIFFS' EXHIBIT No. 27-B

[Letterhead Addison P. Knapp Co.]

November 30, 1945

Mrs. Frances M. Steinbach,
Mrs. Carolyn S. Steinbach,
Steinbach Blacksmith & Machine Shop,
Tillamook, Oregon.

Dear Mesdames:

We are sending you, herewith, our check No. 6267 payable to your order in amount of \$187.50. This is refund of remittance forwarded to our office by James H. Corgan under date of October 30, 1945.

The Universal Insurance Company has refused to accept this remittance as applying to any portion

of the additional premium of \$1,250 set forth in endorsement to its Policy No. PC 50295, dated October 24, 1945. The company's reason for being unwilling to accept the remittance is based on the fact that the Suction Dredge "Wishram" was not towed from Nehalem Bay to Tillamook Bay by the tug "Umpqua Chief" as called for by the endorsement.

We recently submitted certain facts concerning the loss of the dredge on November 1, 1945 to the San Francisco office of the insurance company, and have just been instructed by that office to inform you that inasmuch as the policy conditions were not complied with, they find it necessary to deny all liability for the loss under Universal Policy No. PC 50295.

We greatly regret that the insurance company finds it necessary to deny liability in this case.

Very truly yours,

ADDISON P. KNAPP CO.

By /s/ ADDISON P. KNAPP.

APK:pks

Encl.

PLAINTIFFS' EXHIBIT No. 28

Corbettxxxx

December 13, 1945.

Addison P. Knapp Co.,
General Insurance,
620 Henry Building,
Portland, 4, Oregon.

Dear Sirs:

Enclosed herewith please find your check No. 6267, dated November 30, 1945, payable to Frances M. Steinbach and Carolyn S. Steinbach, in the sum of \$187.50, which I am returning to you.

The amount represented by said check, to-wit: \$187.50, represents premium paid for Universal Policy-PC 50295, together with endorsement to cover the Dredge "Wishram."

The insured under said policy insist that they be paid for the loss of the "Wishram" in accordance with the coverage as provided by your policy of insurance issued to the insured, and for which the premiums were duly paid.

Yours very truly,

.....

Enc.

FJL:lj

PLAINTIFFS' EXHIBIT No. 29

[Letterhead MacCormac Snow]

December 27, 1945

Hon. Frank J. Lonergan
Corbett Building
Portland 4, Oregon

Dredge Wishram

Dear Judge Lonergan:

This will refer to our telephone conversation and my promise to write you on behalf of Universal Insurance Company in answer to your letter of December 13, 1945, addressed to Addison P. Knapp Co.

The latter company, as agent of the insurance company, sent their check for \$187.50 to your client for the reason that Universal Policy PC 50295 did not cover the Wishram in respect to the damage which this dredge suffered, and therefore no part of this premium was payable. Since your client paid the Knapp Co. \$187.50 on account of this premium, Mr. Knapp returned this money in the form of the above check. Upon return of the check with your letter of December 13, Mr. Knapp handed the check to me and I now have it.

Since we cannot be sending this check back and forth, I suggest that it rest either in your files or mine upon a stipulation that such disposition of

the check shall prejudice neither your clients in the prosecution of any claim they see fit to make against the insurance company, nor the insurance company in the defense of any such claim, and that all parties waive tender by check rather than by United States money.

I await your advice concerning the proposed stipulation.

Yours very truly,

/s/ MacCORMAC SNOW.

MS/ml

96-101 TILLAMOOK BRANCH 96-101
 THE FIRST NATIONAL BANK OF PORTLAND

TILLAMOOK, OREGON

19 45 No.

PAY TO THE
 ORDER OF

THE FIRST NATIONAL BANK OF PORTLAND, TILLAMOOK BRANCH

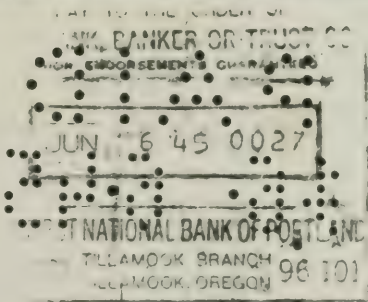
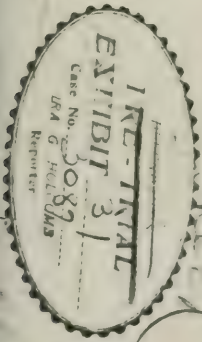
\$675.⁶⁰

Six hundred seventy five & ⁶⁰/₁₀₀ DOLLARS

For
 Certified Check)

Frances M. Steinbach

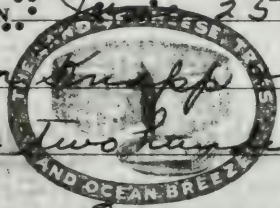
11760



96-101 TILLAMOOK BRANCH 96-101
THE FIRST NATIONAL BANK OF PORTLAND

TILLAMOOK, OREGON 25 1945 No.

PAY TO THE ORDER OF Addison Knapp Co. \$ 1250.⁰⁰
One thousand two hundred fifty ~~no~~ ⁷⁰ DOLLARS
Insurance on
bridge Hickman
from Cross Bay to
Hickman Bay
Frances M. Steinbach



PLAINTIFFS
DEFENDANTS
EXHIBIT 32
Case No. 3087
IRA G. HOLCOMB
Reporter

24-11-45
PAY TO THE ORDER OF ANY BANK OR TRUST CO. OR THROUGH THE CLEANSING HOUSE PRIOR TO NOVEMBER 24 1945
24-11-45
11760

PAY TO THE ORDER OF
THE UNITED STATES NATIONAL BANK
3723 PORTLAND, OREGON 3723
ADDISON P. KNAPP CO.

11760

Coast Dredging & Construction Ltd.
Tillamook, Oregon

No. 43

TILLAMOOK, OREGON, October 30 1945

PAY TO THE
ORDER OF

Addison P. Knapp

\$187⁵⁰

One Hundred eighty seven and 50/100

DOLLARS

TO TILLAMOOK BRANCH
THE FIRST NATIONAL BANK OF PORTLAND

Coast Dredging & Construction Ltd.

96-101 TILLAMOOK, OREGON — 96-101

BY J. H. Morgan



PAY TO THE ORDER OF
THE UNITED STATES NATIONAL BANK
3723 PORTLAND, OREGON 97203
ADDISON P. KNAPP CO.

Pay to the order of
through the
ALL PAYMENTS
BANK OF BANKER OR
CLEARING HOUSE
NOV 8 1945
24-1 POI
FEDERAL RES
24-1
NOV 8 1945

NOV-8-1945
THE UNITED STATES NATIONAL BANK
3723 PORTLAND, OREGON 97203
ALL PAYMENTS
BANK OF BANKER OR
CLEARING HOUSE
NOV 8 1945

11760

EXHIBIT 33
TRE-TOTAL
Case No. 587
IRA G. HOLCOMB
REC-107

PLAINTIFFS' EXHIBIT No. 34-A

[Envelope]: To Jimmy Corregon, Rockaway, Ore.

[Postmarked]: Bay City, Oreg., Oct. 19, 12 m., 1945.

PLAINTIFFS' EXHIBIT No. 34-B

Garibaldi, Ore.

Jimmy Corregon
Rockaway, Ore.

Dear Sir:

Sorry I didn't get to see you yesterday but it was too late when we returned from Astoria.

About that tow job, perhaps you'd better scout around for another boat. I talked with several around here and learned that they charge \$75 for just towing one of those rafts from Tillamook to Garibaldi—no bars to cross. Curt Sause said he would ask \$300. I thot that a little high. But with 4 bar crossings this time of year I feel \$100 too little for the risk—I'd say \$200.

I have to go to Depoe Bay but will be back Monday. If you haven't found other means by then maybe we can work something out.

Yours—

/s/ REA DAVENPORT.

PLAINTIFFS' EXHIBIT No. 37

[Statement Addison P. Knapp Co.]

October a/c 1945

Frances M. & Carolyne S. Steinbach

c/o Captain J. H. Corgan

General Delivery

Garibaldi, Oregon

October 24th—Universal Policy PC 50295—Dredge
“Wishram”

Additional Nehalem to Tillamook.....\$1250.00

To be returned safe arrival, no claim.. \$1062.50

Premium in event no claim.....\$ 187.50

PLAINTIFFS' EXHIBIT No. 39

[Letterhead Emmett Rathbun]

Report of the investigation of the total loss of the Dredge “Wishram” at the entrance of Tillamook Bay on November 1, 1945.

The Dredge “Wishram” was in tow of the G.F.B. “Julia D” at the time of the accident. The tow had left Nehalem Bay November 1, 1945 and was proceeding to Garibaldi, Oregon in Tillamook Bay. The Dredge “Wishram” was wrecked approximately 100 feet inside the Jetty at Tillamook Bay and became a total loss. The dredge was washed up onto the Jetty and salvage operations were im-

possible. The sea completed the destruction of the dredge.

The investigation as to the events prior to the accident were secured from Chief Paris of the U. S. Coast Guard, Tillamook Bay Station, Otto Berg owner and operator of the "Julia D" the towing vessel, Captain Corigan and his son Jim Corigan, operators of the dredge.

From Chief Paris of the U. S. Coast Guard, Tillamook Bay Station, the following chronological report of the events leading up to the loss of the dredge was secured:

At 8:30 a.m. November 1, 1945 Captain Corigan called the U.S. Coast Guard Station, Tillamook Bay and advised them that the gas fishing vessel "Julia D" would undertake the towing of the dredge "Wishram" from Nehalem Bay, Oregon to Tillamook Bay, Oregon, a tow of approximately 11 miles that morning and requested that the Coast Guard dispatch one of their boats to stand-by the tow from Nehalem Bay to Tillamook Bay. The Coast Guard boat arrived at the entrance of Nehalem Bay at 9:45 a.m. The tow crossed out over the Nehalem Bay bar at 9:45 a.m.

Weather—Bar smooth—wind 2 miles velocity South—high water at 11:30 a.m. tide ebbing. No storm warnings. There were storm warnings hoisted from the Columbia River North after 1:30 p.m.

Tow arrived at Tillamook bar ready for the crossing at 1:00 p.m. Tide ebbing. Wind velocity 2 miles South. Sea strong. At 1:25 p.m. tow rope broke.

Tow on the bar. Dredge drifted north towards Jetty. Coast Guard assisted in recovering the dredge and the tow line was again secured to the tow.

2:04 p.m.—Tow again started across the bar. Wind velocity had increased 11 to 16 mile velocity, sea strong, tide ebbing. Tow rope broke. Dredge drifted North towards North Jetty. Coast Guard assisted in recovering dredge. The tow line again secured to the dredge.

2:39 p.m.—Tow started across bar. 11-16 wind velocity from South. Sea strong—tide ebbing. Tow rope broke. Coast Guard assisted in securing dredge. Otto Berg, Captain of the towing vessel refused to continue with the present tow line. He asked the Coast Guard to secure another line. Tow laid to in the wind.

4:00 p.m.—Coast Guard returned to Tillamook Bay Station and secured a tow line—4" rope line approximately 600 feet long. Returned to the tow at 5:00 p.m. Tide at 5:00 p.m. low water slack, sea strong, wind velocity 11-16 miles.

5:30 p.m.—Coast Guard put man from the towing vessel on to Dredge. This man secured the towing line. Chief Paris was now in command of the Coast Guard vessel. During the wait, the tow had drifted North approximately one mile near Twin Rocks, Oregon. The Captain of the towing vessel was waiting for the tide to flood.

5:45 p.m.—Raining, dark, wind velocity 11-16 miles, sea strong, tide flooding. Captain of towing

vessel could not see can buoy off Tillamook entrance, asked Coast Guard to find the can buoy and guide him to it. The towing vessel had to pull against the wind and heavy north sea. Coast Guard came back and forth from tow to can buoy at the entrance of Tillamook Bay bar.

6:00 p.m.—Tow arrived at can buoy and made ready to come in. Tide flooding, dark, raining, 11-16 miles wind velocity, South bar strong. Coast Guard went ahead of tow. 6:00 p.m. crossing.

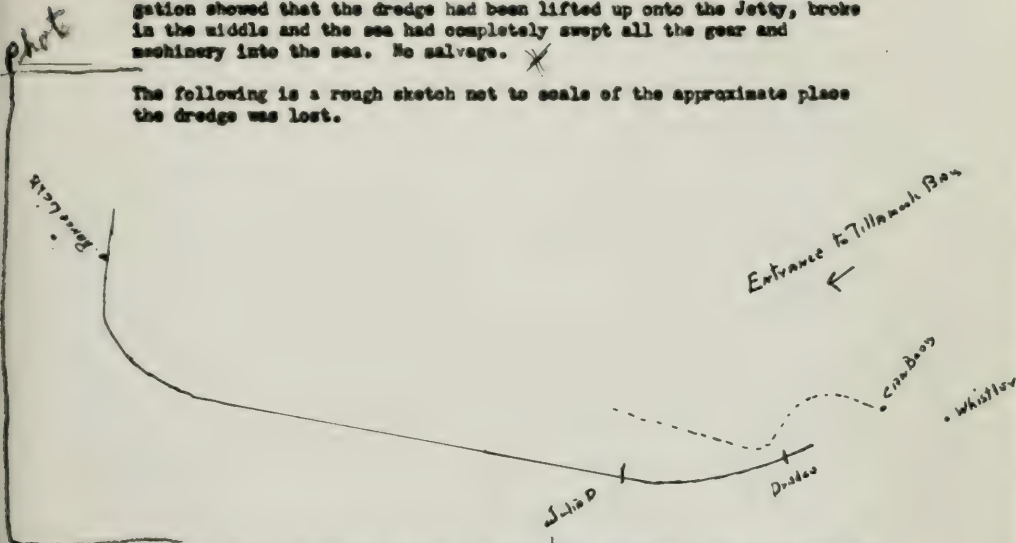
6:30 p.m.—“Julia D” inside entrance to the bar. Dredge “Wishram” trailing behind approximately 600 feet. Dredge “Wishram” just outside the Jetty.

6:35 p.m.—Captain of “Julia D” called to Coast Guard that the dredge had grounded on North Jetty. The towing line broke and he said that his engine was stalled. Tug with stalled engine drifted towards North Jetty.

6:37 p.m.—Coast Guard approached the “Julia D”. On approaching the tug the Captain of the tug in his excitement threw a line over the stern which nearly fouled the propeller of the Coast Guard boat, the line did not get aboard. Coast Guard pulled away and made second attempt, by this time the tug was on the North Jetty, the Coast Guard put a line aboard the tug, pulled her off the North Jetty and towed her in to Garibaldi, Oregon.

By this time the wind velocity had increased, the Bar was heavy and no attempt could be made to get to the dredge. The next morning investigation showed that the dredge had been lifted up onto the Jetty, broke in the middle and the sea had completely swept all the gear and machinery into the sea. No salvage. ✕

The following is a rough sketch not to scale of the approximate place the dredge was lost.



From the above sketch it is evident that the accident occurred after the dredge had passed over the bar and was approximately 100 feet inside the end of the Jetty.

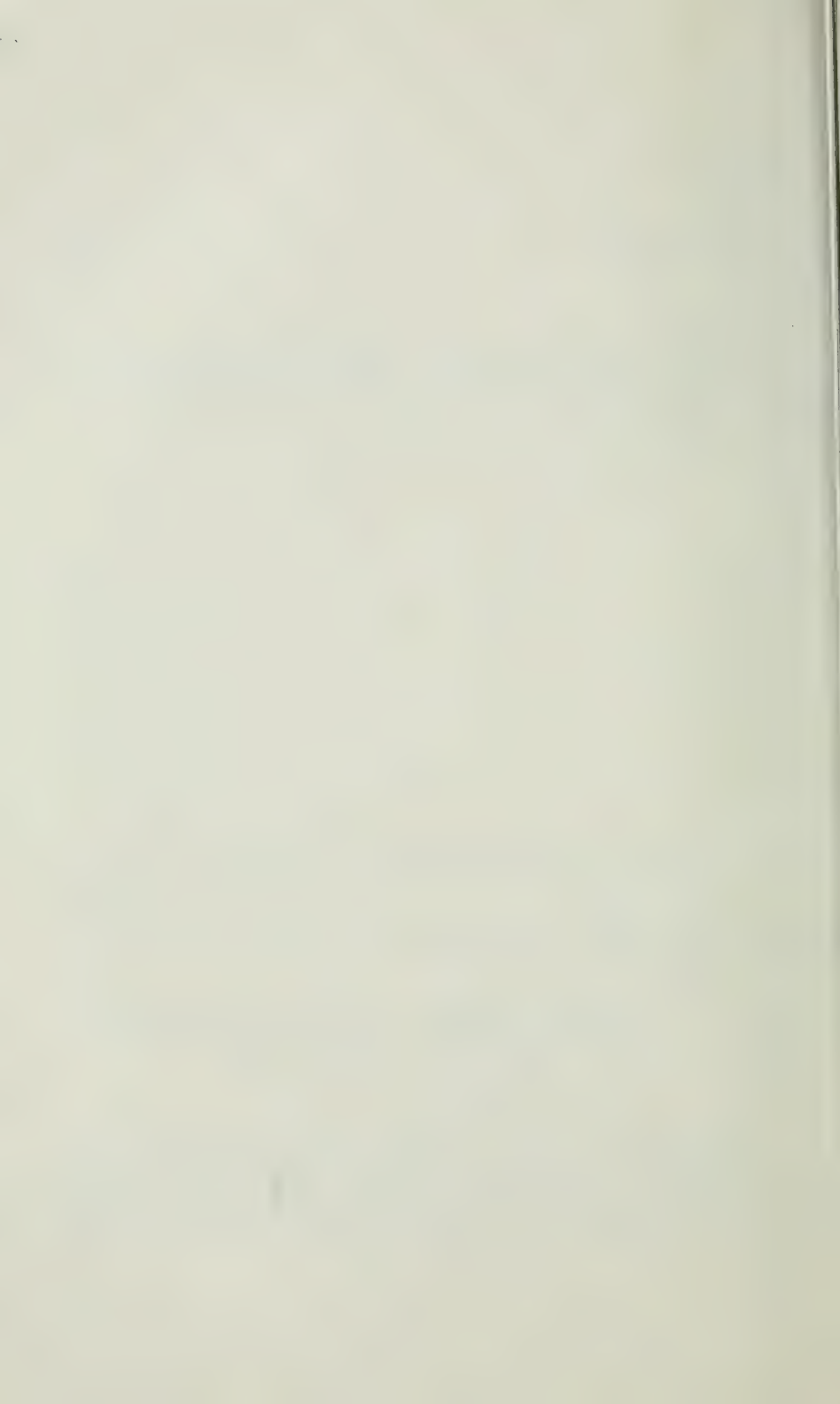
Berg From Otto Berg the owner and Captain of the "JULIA D" the following facts were secured.

"JULIA D" 36' long - 10.8' beam - 5 foot draft - 8 tons net - 110 h.p. Chrysler Crown gas motor. 3 $\frac{1}{2}$ to 1 reduction gear throwing a 30" X 24" propeller. 3.46

Built - 1942 by Sessions at Bay City, Oregon

Gas Screw trolling vessel

Captain Corigan, operator of the Dredge "WISHRAM" contacted Otto Berg on October 31, 1943 asking him if he would undertake the towing of the Dredge "WISHRAM" from Nehalem Bay to Tillamook Bay. Otto Berg said he would undertake the job if Captain Corigan would furnish the tow line and also move the dredge down the bay to the inside entrance of Nehalem Bay. The above move was to save time and daylight.



On Berg's arrival at Nehalem Bay, he found that the dredge had not been moved down the bay but was moored at the shingle mill [Brighton Shingle Co.] at Wheeler, Oregon. Berg proceeded to the dredge. Captain Corigan brought out a hemp towing line which he said he borrowed from the Coast Guard. It was about $1\frac{1}{2}$ " diameter, had been spliced and was frayed, it was approximately 400 feet long. Berg had provided a bridle on his boat. It ran from the bitt forward around each side of the pilot house and came together approximately 5 feet from the after end of his house which would bring the two lines together about amidship on Berg's boat. This bridle was from $1\frac{1}{2}$ " to $1\frac{3}{4}$ " diameter. The bridle on the dredge was well fastened and of sufficient strength. Neither bridle broke during the tow. The hemp hawser used as a tow line was fastened to each bridle and the tow started out.

After clearing the Nehalem Bar the towing rope broke at the bridle of the dredge. It was again secured and the tow proceeded to Tillamook Bay entrance. Again (several times Berg said) the towing hawser broke near the "whistler" at the entrance to Tillamook Bay before the first attempt to cross the bar was made. Berg's version corresponds with the chronological story of the Coast Guard from there on. He stated that after the third attempt at the crossing he refused to make another try until a new towing line was secured. This was done.

He also stated that he did not ask the Coast Guard to help him as he felt that he could make it in to Tillamook Bay without their help. If he turned

the tow over to the Coast Guard he would have to relinquish responsibility and he did not want to do that. Besides he stated he had more power than the Coast Guard. He stated that he did get the dredge over the bar and would have come in but as the dredge passed the end of the Jetty a patch of white water hit the dredge, throwing the dredge against the North Jetty.

He also stated that the tow line did not break until the dredge hit the Jetty and the cause of his engine failure was that the tow rope fouled his propeller. He tried to start the motor and it would not start. He found the cause was the fact that in his excitement, he did not throw his gear out and the motor would not start in gear.

Captain Corigan and his sone Jim Corigan could not add to any of the above facts as they were not with the tow.

The dredge is a total loss.

Damage to the "Julia D" the towing vessel.

Two hull planks cracked

Keel split

Wheel bent

Shaft—to be checked for alignment.

/s/ EMMETT RATHBUN,
Surveyor.

[Endorsed]: No. 11760. United States Circuit Court of Appeals for the Ninth Circuit. Universal Insurance Company, a corporation, Appellant, vs. Frances M. Steinbach, also known as Francis M. Steinbach, and Carolyn S. Steinbach, Appellees.

Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed October 17, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

Civil No. 11760

UNIVERSAL INSURANCE COMPANY,
a corporation,

Appellant,

vs.

FRANCIS M. STEINBACH and
CAROLYN S. STEINBACH,

Appellees.

UNIVERSAL INSURANCE COMPANY,
a corporation,

Third-Party Plaintiff,

vs.

OTTO BERG and OTTO BERG, JR.,

Third-Party Defendants.

POINTS ON APPEAL AND DESIGNATION

To the Clerk of the above entitled Court:

The appellant hereby adopts as his concise statement of the points on which he intends to rely on

this appeal his statement of such points heretofore filed with the Clerk of the United States District Court for the District of Oregon and hereby designates the portions of the record on appeal which said appellant thinks material to the appeal and requests the Clerk of said appellate court to print only the portions hereinafter designated. Referring to appellants designation of the parts of the record in the said District Court to be included in the record on appeal and to the numbered items thereof, appellant requests the Clerk of said appellate court to print only the following

Items 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 16, 17, 20, 21, 22, 23, 24, 25 and 26.

Exhibits 3, 4, 11 and 14 attached to Pre-trial Exhibit 7 which exhibit forms item 11 of said designation.

This statement and designation.

The following portions of item 10 of said designation, each line number being inclusive and each line so numbered being included in the portions to be printed and the page numbers referring to numbers placed on said transcript in blue ink by use of a numbering machine:

From line 1, page 2	to line 15, page 9
From line 1, page 14	to line 11, page 51
From line 17, page 56	to line 17, page 58
From line 1, page 59	to line 7, page 66
From line 5, page 72	to line 19, page 74
From line 11, page 80	to line 7, page 86
From line 10, page 88	to line 22, page 88

From line 6, page 95 to line 12, page 97
From line 5, page 102 to line 4, page 112
From line 1, page 115 to line 3, page 116
From line 5, page 118 to line 21, page 121
From line 9, page 125 to line 11, page 125
From line 18, page 130 to line 7, page 141
From line 7, page 147 to line 26, page 147
From line 1, page 148 to line 17, page 177
From line 4, page 181 to line 9, page 181
From line 19, page 185 to line 24, page 185
From line 1, page 226 to line 17, page 259

/s/ MacCORMAC SNOW,
Attorney for Appellant.

Service of the within statement and designation
is admitted this 10th day of November, 1947.

/s/ W. K. PHILLIPS,
Of Attorneys for Appellees.

/s/ B. G. SKULASON,
Attorney for Third-Party
Defendant.

[Endorsed]: Filed Nov. 14, 1947.



In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY,
a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CARO-
LYN S. STEINBACH,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

MACCORMAC SNOW,
602 Pacific Bldg.,
Portland 4, Ore.,
Attorney for Appellant.

FILED

MAR 23 1948

PAUL P. O'BRIEN, CLERK

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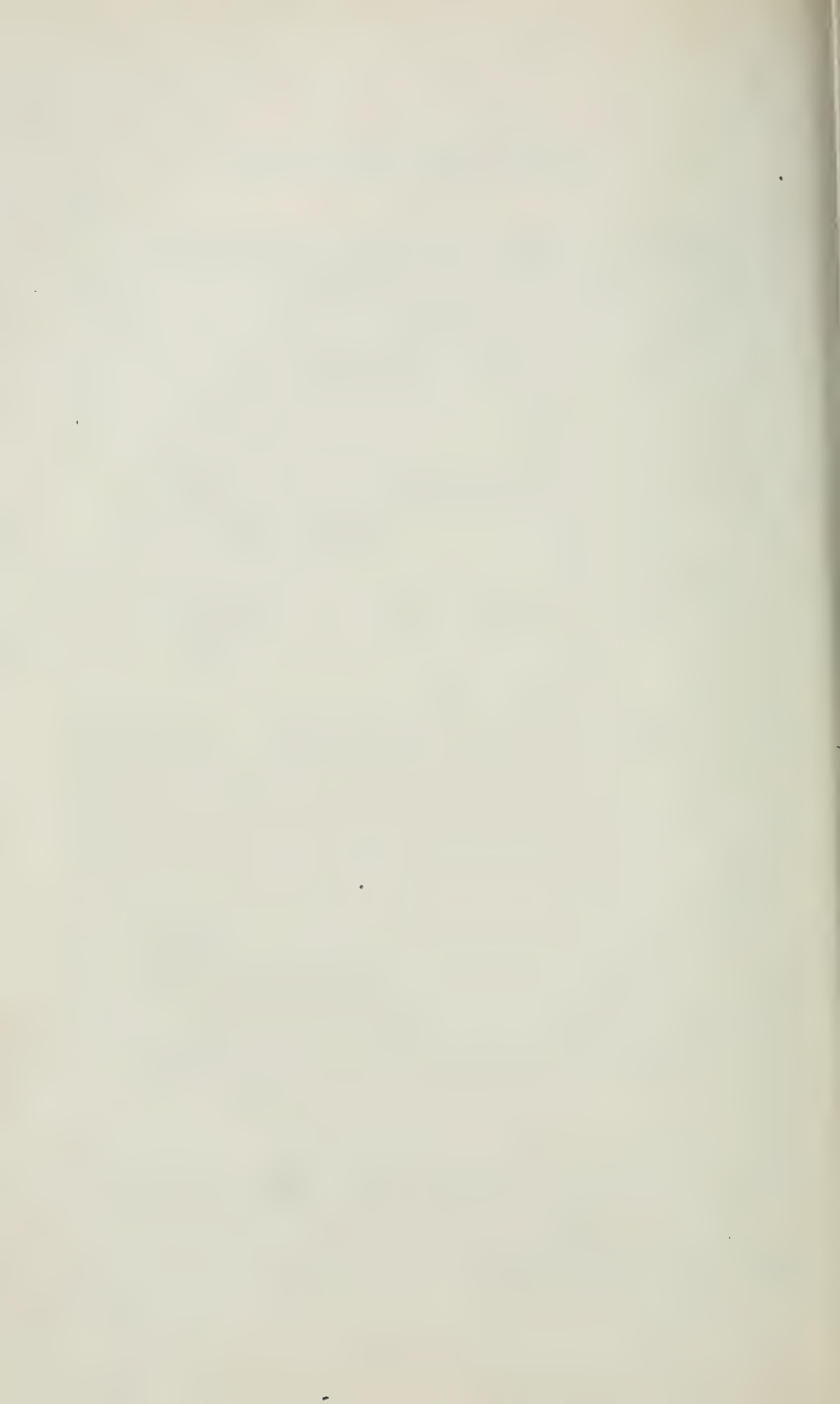
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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY,
a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CARO-
LYN S. STEINBACH,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION

This is an action on a marine insurance policy. It was commenced at law, (2) but with the filing of the reply (7) may be said to have crossed over to the equity side of the court. The plaintiffs are residents and inhabitants of Oregon and the defendant is a New Jersey corporation. The matter in controversy exceeds the sum or value of \$3000 exclusive of interest and costs. The District Court had jurisdiction of this cause under U.S. C.A. 28: 41 (1). The

District Court of Oregon having once secured jurisdiction on the ground of diversity of citizenship did not lose that jurisdiction by the filing of the third party complaint. *Lilienthal v. McCormick* (C.C.A. 9), 117 Fed. 89, 96; *First National Bank of Salem v. Salem Capitol Flour Mills* (D. Ore.), 31 F. 580; *Division 525 v. Gorman* (C.C.A. 8), 133 Fed. 2nd 273. This Court has jurisdiction by virtue of C.C.A. 28:225. The final judgment appears on page 53 and the notice of appeal on 55.

STATEMENT OF THE CASE

This suit is grounded upon a marine insurance hull policy covering the suction dredge WISHRAM. Undisputed evidence raises two issues upon this appeal, — the first relating to lack of ownership and insurable interest in the dredge on the part of the plaintiffs-appellees, and the second to unseaworthiness of the dredge at the start of the voyage on which it was lost.

The plaintiffs-appellees are the wives of John L. Steinbach and David E. Steinbach of Tillamook, Oregon. The defendant-appellant is a corporation engaged in writing marine insurance policies in Oregon, represented in Oregon by Addison P. Knapp Co., of which Addison P. Knapp was the head and Emmett Rathbun was a member of the firm and a marine surveyor.

The defendant-appellant, as third-party plaintiff, impleaded the third-party defendants, Otto Berg and Otto Berg, Jr., operators of the fishboat JULIA D, which was attempting to tow the dredge WISHRAM at the time of its loss, charging them with negligence and responsibility for the loss of the dredge, and charging a right of subrogation over in the event the court should find liability on the policy. (39) The District Court, however, refused to allow the issues between the defendant and third-party plaintiff and the third-party defendants to be tried at the same time as the issues between the plaintiffs-appellees and the defendant-appellant. This decision resulted in some prejudice to the defendant-appellant in respect to the second ground of this appeal, to-wit: the defective hawser with which the towage was attempted, because the issues in the two cases came together at this point.

The appellees filed their complaint on the law side in March, 1946, alleging that they were the owners of the dredge, that the policy duly issued and later was indorsed to cover towage of the dredge from Nehalem Bay to Tillamook Bay, Oregon, that the dredge was lost on this voyage through perils of the sea, and demanding judgment (2-4). Later they filed their supplemental complaint asking for attorneys' fees (5).

After the filing of the complaint, as the court will observe in the docket entries (67-68), motions and affidavits were filed, and the defendant-appellant

secured issuance of subpoenas duces tecum and took the depositions of the plaintiffs and others in Tillamook, Oregon, on June 17, 1946 (Exhibit 7) (77).

These activities resulted in increased knowledge of the case by both parties. The appellant learned through the depositions that the appellees had never owned the dredge and had no insurable interest therein. The appellees learned that the requirement for the towage by the tug UMPQUA CHIEF in the endorsement extending the policy to cover the trip from Nehalem Bay to Tillamook Bay (Exhibit 26c, p 232) was an express warranty, and that the attempted towage by the fishboat Julia D was a breach of this warranty, and voided the policy at law.

Thereupon the appellees filed their reply (7-17) in which they charged that the endorsement was not in accordance with their understanding, and had been misdirected in the mail, and was not received until after the loss, and prayed (17) that the endorsement be reformed by striking therefrom the language: "in tow of the tug 'Umpqua Chief'."

Appellant then filed its amended answer (18-38), which is responsive to (1) the original complaint, (2) the supplemental complaint and (3) the reply.

In its amended answer, with respect to insurable interest, the appellant denied (18) the allegation of the complaint that the appellees owned the dredge, and pleaded (31-32) that one Hugh Corgan, known as Captain Corgan, purchased the dredge from the

government with money supplied by J. L. Steinbach and D. E. Steinbach, a portion of which they borrowed from Frances M. Steinbach upon their unsecured promissory note, and that Corgan, prior to the issuance of the policy, represented to agents of the appellant that the appellees owned the dredge. Consequently appellant alleged that at no time did appellees or either of them own any part of the dredge.

Touching the warranty in the endorsement that the towage was to be done by the tug Umpqua Chief, appellant alleged that this was inserted in the endorsement following a representation by Captain Corgan that the towage would be by the Umpqua Chief, and because this tug was approved by the Board of Marine Underwriters, whereas no fishboat was so approved for towage purposes (34-37).

In respect to the defective hawser, appellant pleaded (36) that the hawser used on the towage was borrowed by Captain Corgan from some person unknown to the appellant and was not a sufficient hawser for the towage, that these facts were known to Captain Corgan, and that because of these facts the dredge was unseaworthy at the start of the towage, in breach of the implied warranty of seaworthiness of the policy endorsement.

The case was tried without a jury upon the issues made by the complaint, supplemental complaint and reply of the appellees together with the

amended answer of the appellant. The Court made findings of fact (46) and conclusions of law (51) and entered a final judgment for appellees in the amount of \$11,437.50 and \$1500 attorneys' fees for a three-day trial (53). The appellant considers the trial court greatly in error in this judgment but does not seek again to raise the issues in this appellate court relating to the substitution of the fishboat Julia D, for the tug Umpqua Chief because the decision below on this point was based upon disputed evidence.

This appeal confines itself to the two issues about which there was no contradictory testimony—namely, lack of ownership and insurable interest by and in the appellees, and unseaworthiness of the dredge for the towage by reason of a defective hawser furnished by the dredge which its operators “borrowed” from the coast guard. On these issues the court’s decision allowing plaintiff to recover on the policy raised direct questions of law.

At a pre-trial conference the exhibits were all marked for identification. No pre-trial order was entered. At the trial the exhibits were introduced in a body on the offer of the appellees (59-60, 75).

**FIRST SPECIFICATION OF ERROR: APPELLEES
NEVER OWNED THE DREDGE AND HAD NO
INSURABLE INTEREST THEREIN, AND
THE POLICY IS THEREFORE VOID**

The District Court erred in holding that the appellees were the proper parties to sue on the insurance policy and in permitting appellees to recover in face of the facts that

1. They were never the owners of the dredge;
2. They had no insurable interest in the dredge;
3. The dredge was never transferred to them by any effective conveyance or at all;
4. They were not the real parties in interest in the recovery;
5. The policy sued on was void for want of insurable interest in the appellee.

Under this first branch of our case appellant will discuss together the above points which form the first eight points relied on in this appeal (58).

PLEADINGS AND FINDINGS

The only kind of insurable interest in the dredge which appellees have pleaded is ownership. The complaint alleges (2):

“That during the times herein mentioned the plaintiffs were the owners of a suction dredge named ‘WISHRAM’.”

The amended answer in Paragraph I denies the above allegation (18). Appellant's affirmative allegations on insurable interest in its amended answer (31-34) charge the ultimate facts as shown by the evidence.

The issue is ownership.

The trial court found as a fact (47):

“That the plaintiffs are and were at all times herein mentioned proper parties to insure a certain suction dredge named the ‘Wishram’.”

We need hardly point out that the above finding of “fact” includes no fact; it is the Trial Court's conclusion. It is at variance with the allegation of the Complaint that the appellees owned the dredge. This finding was prepared for the trial court by counsel for the appellees. The Court could not have found as a fact that appellees owned the dredge because the testimony showed that they never owned it or intended to own it.

STATEMENT OF FACTS

John L. Steinbach and David E. Steinbach are brothers and business partners. They live in Tillamook and for a long time have conducted a machine shop business under the assumed business name Steinbach Iron Works. Their assumed business name certificate (Exhibit 14, 226) shows that they are the only persons having an interest in this busi-

ness. The appellees, their wives, are respectively Frances and Carolyn Steinbach.

The dredge Wishram, built and owned by the government, was for sale by the army engineers at Coos Bay, Oregon, in June of 1946.

Hugh Corgan, referred to sometimes as "Captain" Corgan, had previously been in the dredging business and had known the Steinbachs for thirty years (119).

On May 30, 1945, Hugh Corgan, J. L. Steinbach and David E. Steinbach had a talk which resulted in a verbal deal confirmed by J. L. Steinbach by letter to Corgan dated May 31, 1945 (Exhibit 13) (225).

"In line with what was talked yesterday it is our understanding that we will form a corporation with you, Dave, and I each holding one-third of the stock. Your son, Jimmie, will be given a share of stock by each of us although in order to make it come out right he should have four shares which would leave 32 shares to each one of us."

John L. Steinbach testified (105):

"We intended to organize a dredging company with Dave Steinbach, Hugh Corgan and myself, to take over this dredge and operate it and, as the dredge earned money, the money that was advanced by the wife would be paid back, and then the dredge would become our property and each one of us would have a one-third interest."

This arrangement was made while the purchase

of the dredge was in course of completion. Captain Hugh Corgan made the purchase. He paid the money on May 25, 1945, and took title on June 6, 1945. The two War Department letters are set forth at pages 228 and 229. The document of title takes the form of a letter on the letterhead of the District Engineer, War Department (Exhibit 22). We reproduced it here because of its importance (229).

“6 June 1945.

“Captain Hugh Corgan,
2944 N. E. 68th Street,
Portland, Oregon.

Dear Sir:

Receipt is acknowledge of your certified checks for \$1,000 and \$4,500, full payment for the Dredge ‘WISHRAM’ and equipment at the Kruse & Banks Shipyard, North Bend, Oregon.

Upon presentation of a copy of this letter to the Resident Engineer, U. S. Engineer Office, Empire, Oregon, he will deliver to you or your authorized representative, the property comprising the sale.

Very truly yours,

/s/ HORACE H. PERSON,
Captain, Corps of Engineers,
Executive Officer.”

Pursuant to this letter Captain Hugh Corgan took possession of the dredge at North Bend on Coos Bay, and thereafter retained title and possession.

Captain Hugh Corgan has a son named J. H. Corgan, sometimes called “Jimmy”. A couple of months

after the purchase of the dredge and on July 23, 1945, Captain Corgan and his son formed a partnership under the name "Coast Dredging & Construction, Ltd." They filed their assumed business name certificate in Tillamook County (Exhibit 7 (3), p. 219), giving their post office addresses as Tillamook, Oregon, and reciting that they are the true persons conducting, having an interest in, or intending to conduct the business of Coast Dredging & Construction, Ltd.

Captain Corgan has never executed any instrument transferring the dredge to the appellees or to anybody else (Steinbach 99), nor is there any testimony of any attempted transfer by him, by bill of sale, or act or otherwise. At all times from the purchase of the dredge to its loss he maintained possession of the dredge in himself and his son and his business partnership Coast Dredging & Construction, Ltd. At the trial he disclaimed interest in the dredge but there is no evidence of any such disclaimer prior to the trial.

John L. Steinbach and David E. Steinbach, doing business as Steinbach Iron Works, furnished the money with which Captain Hugh Corgan bought the dredge, and the money with which he insured it in the names of the appellees under the pretense that it belonged to them, and operated it from the time of purchase to the time of its loss through himself, and his son, J. H. Corgan, operating as Coast Dredging & Construction, Ltd. They advanced the amounts

of the repair bills and did some of the work in their machine shop and advanced wages for the two Corgans. The amount of their expenditures, less some small returns, is shown to be \$9,446.26 (Exhibit 7(4) p. 222). This Exhibit shows two pages from the ledger of Steinbach Iron Works, being the account therein of Coast Dredging & Construction, Ltd. (John L. Steinbach 106-108).

Of this money Steinbach Iron Works borrowed \$2,925 from the appellee, Frances Steinbach, upon their unsecured promissory note signed by Steinbach Iron Works by J. L. Steinbach, D. E. Steinbach. Exhibits 11 and 14 to the Tillamook depositions, Exhibit 7, are set forth on page 223 of the transcript (John L. Steinbach, 93 and 95). The ledger page of Steinbach Iron Works on page 223 headed "Frankie", meaning Frances M. Steinbach, refers to the same borrowing as is evidenced by the promissory note on page 223. Prior to the loss of the dredge Steinbach Iron Works made payments on the note to the extent of \$1,275.00, leaving a balance of \$1,650.00 due thereon at the times of the loss and the trial (John L. Steinbach, 96). The loss of the dredge will make no difference to Frances Steinbach in regard to her collection of the balance due on this promissory note. John L. Steinbach made that entirely clear. We quote (96-97):

"Q. That promissory note to your wife is entirely unsecured, is it not? A. Right.

Q. Never has been secured? A. No.

Q. When you and your brother borrowed that money from your wife, you expected to pay it back, didn't you?

A. Well, we expected to pay it back, and we didn't get it all paid back, when the dredge was in operation the dredge was to pay it back, from earnings of the dredge.

Q. You are going to carry out that intention and pay the amount of that note back? A. Yes.

Q. You are going to pay her all the \$1650 you owe her? A. We are.

Q. You are going to do it regardless of how this case comes out? A. We are.

Q. That money that your wife loaned you came from her separate earnings and savings? A. It did.

Q. Her earnings teaching school?

A. Yes.

Q. As far as the loss of this dredge is concerned and this outstanding insurance policy, it won't make any difference whether you collect that money, or whether your wife collects that money as a result of this lawsuit or not; she is going to get \$1650, isn't she? A. She sure is.

Q. Then, as far as the loss of the dredge is concerned, she is going to get the \$1650 just the same with the dredge lost as if it had not been lost, isn't she? A. Absolutely."

The appellee Carolyn Steinbach furnished no loan, money or money's worth toward the dredge. Appellees did not put her on the witness stand, but she so testified in Tillamook, June 17, 1946 (Exhibit 7).

The army engineers delivered to Captain Hugh Corgan his document of title to the dredge, Exhibit

22 (229), on or about the date it bears, namely, June 6, 1945, at the Pittock Block, Portland, Oregon (Corgan 121). John L. Steinbach was with him at the time and Corgan handed the letter to Steinbach, who put it in his pocket (Steinbach 84; Corgan 120-121).

The two then went to Addison P. Knapp, Agent of the appellant insurance company, to arrange a policy of insurance covering the dredge. They wished a policy to permit towage from Coos Bay to Nehalem Bay followed by a lay up rate there until they should be ready to work the dredge. Mr. Knapp told them it would be necessary to get a clearance from San Francisco on the rate. Valuation was tentatively fixed at \$12,500.00. He also explained that a survey by Robert Banks, Coos Bay representative of the Board of Marine Underwriters, would be necessary "as to the dredge and the towing vessel" (Knapp 194-196). Mr. Banks then surveyed and approved the dredge and the tug Umpqua Chief, which made the towage to Nehalem Bay. The policy issued dated June 6, 1945.

Let us describe the policy before we explain how it came to be made in the names of the two appellees. A copy of as much of the policy as is material to this case appears in the transcript (63-67). The original policy is a part of the record in this court as Exhibits 23, 24b and 26c. Attached to the regular policy form is American Hulls (Pacific) 1944 endorsement, which by its terms is substituted

for the policy form except for provisions required by law to be inserted in the policy (66). This endorsement is extremely lengthy and nearly all of the clauses of the endorsement have no bearing on the issues of this case, hence the abbreviation of the policy for printing in the record.

The policy provided for a lay up rate after its attachment and during the time the dredge remained at Coos Bay, followed by a rate of \$1250 for the towage to Nehalem Bay, of which \$1062.50 was to be returned on safe arrival (Knapp 196). Upon arrival the company charged an operating premium at Nehalem Bay (Exhibit 24a and b) and returned \$415.74, being the above \$1062.50 less the lay up premium at Coos Bay and the operating premium at Nehalem Bay. Addison P. Knapp Co. paid this \$415.74 by its check to the appellees. Carolyn Steinbach, not having herself put out any money, endorsed the check and delivered it to Frances Steinbach, who cashed it and kept the money. Steinbach Iron Works entered the amount to their own credit on their "Frankie" account with Frances Steinbach (223), and to the credit of Coast Dredging & Construction, Ltd., in their dredge account with that firm (222) (John L. Steinbach, 110).

On October 24, 1945, the endorsement issued purporting to cover the towage from Nehalem Bay to Tillamook Bay by the Umpqua Chief. This was the towage attempted by the fishboat Julia D, resulting in the loss of the dredge. The premium for this

towage was the same as for the former towage, \$1250, less \$1062.50 upon safe arrival. The company received only the difference between the last two figures, namely, \$187.50. This sum the company attempted to return (Exhibit 27b; 233) when it repudiated liability on the ground that the towage was attempted by the fishboat Julia D instead of by the tug Umpqua Chief (Appendix C). Honorable Frank J. Lonergan, who first represented the appellees, returned this check to Addison P. Knapp Company (235) and the check was the subject of a later letter written by the writer of this brief to Judge Lonergan (236-237). Appellant paid the sum of \$187.50 into court on or about May 21, 1946, with its first answer, and about a month later, through the Tillamook depositions, learned of the want of insurable interest of the appellees.

The policy insures the appellees and nobody else, and insures them as *owners* of the dredge and in no other capacity. It provides that it (62-63)

“does insure Francis M. Steinbach and Carolyn S. Steinbach for account of themselves, loss, if any, payable in funds current in the United States to assures, (assureds) or order.”

The American Hulls (Pacific) 1944 endorsement provides that it is (64):

“To be attached to and form a part of Policy No. PC50295 of the Universal Insurance Company, dated June 6, 1945, Francis M. Steinbach and Carolyn S. Steinbach for account of them-

selves but subject to the provisions of this policy with respect to change of ownership.

Should the vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter or requisition. . . . This insurance shall not inure to the benefit of any such charterer or transferee of the vessel . . .”

It will be recalled that when John L. Steinbach and Captain Hugh Corgan went to Addison P. Knapp’s office to negotiate the issuance of this policy of insurance, they had in the pocket of Mr. Steinbach Exhibit 22 (229), being the letter from the government engineers which operated as a transfer of the dredge from the United States to Captain Corgan (Corgan, 133).

Several details were discussed at the meeting, and Mr. Knapp asked in whose name the policy was to be written. Captain Corgan indicated that Mr. Steinbach would answer this question and Mr. Steinbach gave the names of the two ladies, the appellees herein (Knapp 197). Mr. Knapp stated that this was a little unusual and asked the reason. Mr. Steinbach stated (Knapp 197-198):

“. . . that the dredge had been bought or was being purchased in the names of these two women. . . . They simply said the dredge was being purchased in the names of the women, with their money.”

Cross-examined as to whether he pursued the inquiry any further, Mr. Knapp said (Knapp 205):

"I did not. In the insurance business we make a custom of accepting information of that sort.

Q. I didn't get part of that.

A. In the insurance business we make it a practice to accept such statements at their face value."

Mr. Steinbach told the same story. He said (Steinbach 88-102):

"I told Mr. Knapp that this dredge had been bought for the benefit of the Steinbach wives and to make the insurance out to Carolyn and Frances Steinbach."

★ ★ ★

"Is it not a fact that you told them that the ladies owned the dredge?

A. Yes."

Captain Corgan's direct examination on this subject on pages 123 and 124 is of interest. He testified, as did Mr. Knapp and Mr. Steinbach that Mr. Steinbach instructed Mr. Knapp to issue the policy to the two ladies.

"You did not claim to own any interest in it then, did you?

A. No." (123.)

Inasmuch as the government engineer's letter transferring title to Captain Corgan had just been delivered to him in Mr. Steinbach's presence, this was a failure to disclose to Mr. Knapp a circum-

stance material to the risk. Indeed, it was a direct misrepresentation of the fact that Captain Corgan was interested and that he held the legal title to the dredge.

Captain Corgan testified that Mr. Steinbach stated that he did not want Steinbach Iron Works connected with the ownership of the dredge, but that he did not disclose the plan to form a corporation and divide the stock three ways (Corgan 136, 137).

The Trial Court took a hand and asked (123 and 124) three questions attempting to elicit from Captain Corgan testimony tending to show knowledge on the part of the insurance company. We pass over the obvious point that these questions were improper in that while Captain Corgan could testify to what he or Mr. Steinbach *told* the insurance company agents, he could not testify as to what they *knew*. Captain Corgan's answers to the Court's questions were not informative.

Neither the efforts of counsel for the appellees nor those of the court brought forth from Captain Corgan any testimony that he or Mr. Steinbach told Mr. Knapp anything contrary to Mr. Steinbach's statement that the ladies owned the dredge and that the policy was to be issued to them.

There was a reason why Mr. John L. Steinbach wanted the policy issued in the names of the two ladies, and this was because in the event of a loss, the insurance money would be in the hands of the

two ladies, and the creditors of the Steinbach Iron Works would be hindered and delayed. There is no doubt that the two Steinbach brothers were to get the benefit of the bulk of any insurance money that might be paid. Mr. J. L. Steinbach said (88):

“I was interested in just the insurance being enough to cover, to protect us for the amount that we had paid for it. I thought we should insure it for not over \$10,000 and probably \$8,000. We were kind of short of money.”

The pretense that the Steinbach women were to be considered the owners of the dredge, and were to collect the insurance, if any, in the event of the loss of the dredge came about through talks between the two appellees and their respective husbands. Mr. Steinbach was asked, on direct examination, by the appellees' counsel whether there was any discussion between the Steinbachs as to who was to hold title to the dredge. The question being sufficiently leading to indicate what was to follow, appellant entered an objection (85) on the ground that a conference between members of the Steinbach family could not transfer title to the dredge and that such a conference would not be binding upon the appellant (85). This objection was thereafter renewed at all times when this subject arose in the record, and by the consent and understanding of the Trial Court, the objection of the appellant became a continuing one (60, 76, 85, 86, 112, 176). This objection is now before the Appellate Court in

Point 1, in which appellant asserts that the District Court erred (58)

“I. In admitting parol evidence as tending to show transfer of the dredge.”

The Court admitted, over appellant's objection the testimony of the Steinbachs' about these family conferences and the story told was substantially this: During the war the Steinbach Iron Works got into the business of building tugboats for the British Government, which was unprofitable. In June of 1945, they had not received any settlement from the Maritime Commission, and at that time the Steinbach Iron Works was in a rather precarious financial condition. This was when Captain Corgan bought the dredge. By the time the appellant took the depositions of the members of the Steinbach family (Exhibit 7) in June, 1946, the settlement had been made (100). When they bought the dredge in June, 1945, they claimed \$29,000 from the Maritime Commission, and owed \$16,000. Their creditors had waited 27 months, and they did not want these creditors to get any money from the dredge (101). Mr. David E. Steinbach described the situation as it was when the dredge was bought (113).

“... we also had loans from two private men there in Tillamook. One happened to be the President of the First National Bank. Like my brother said, every time he went in the First National Bank he wanted to know how soon we were going to pay him back. So, what we did, we thought that would be the best way, if we

were going to purchase this dredge, to keep it out of the account of the Steinbach Iron Works account.

Q. Then what did you agree to do about the ownership of the dredge?

A. Well, we agreed to put it in the ladies' names."

The two appellees and their husbands, according to the testimony of all of them, had a family conference and agreed that the dredge should be considered owned by the ladies, or, at any rate, that they should insure it. John L. Steinbach testified (103):

"Q. The only basis upon which you make any claim that these two ladies owned the dredge was the family conference among members of the Steinbach family?

A. That is right.

★ ★ ★

Q. Did Captain Corgan attend this conference?

A. No.

★ ★ ★

Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?

A. That is right."

When Mr. Steinbach and Captain Corgan told Mr. Knapp to issue the policy to the two ladies, they withheld from him some very important information.

1. They neither exhibited to him nor told him the contents of the letter which Mr. Steinbach then had

in his pocket by which the U. S. Engineers had transferred the dredge to Captain Corgan (Knapp 198; J. L. Steinbach 102). Asked if he would have issued the policy in the names of the ladies had he received this information Mr. Knapp said (198):

“No, I would have told them that the proper way to insure the dredge would be in the name of whoever might hold title to it.”

2. They did not tell him that Steinbach Iron Works had furnished money for the purchase of the dredge (198).

3. They did not tell him that the reason for insuring the dredge in the names of the ladies was to keep the money away from the creditors of the Steinbach Iron Works (198).

4. They did not tell him of the purpose to organize a corporation to own and operate the dredge, in which Captain Corgan and each of the two Steinbach men was to have 32%, and J. H. Corgan 4% (199).

Mr. Knapp did not learn that the two ladies did not own the dredge until long after the loss and after the taking of the depositions in Tillamook in June, 1946 (Knapp 199,204). He then received this information from the writer of this brief.

Emmett Rathbun, Marine Surveyor with the Addison P. Knapp Co., surveyed the dredge about the middle of October, 1945, preparatory to the then

proposed towage from Nehalem Bay to Tillamook Bay. He included in his report a statement that the dredge was owned by J. H. Corgan. He did this only because he was dealing with Corgan and never looked into the papers to see who really owned it (Rathbun 215). Mr. Knapp saw this report and, no doubt, read the statement in it that J. H. Corgan was the owner. He paid no attention to this statement (Knapp 206). Five months before this Mr. Knapp had issued the policy to the two ladies upon Mr. Steinbach's representation that they were the owners. The purpose of the Rathbun survey was to ascertain the physical condition of the dredge for the towage and not to investigate the title. There was no occasion for Mr. Knapp to be concerned by Mr. Rathbun's statement that J. H. Corgan owned the dredge. J. H. Corgan is the son of Captain Hugh Corgan.

Exhibit 7 (4) (222) taken in conjunction with Exhibit 7 (11 and 14) (223) is a significant and revealing document. The three ledger sheets are from the same ledger, namely, the ledger of Steinbach Iron Works. The sole partners in this firm are John L. and David E. Steinbach (226). The bottom ledger sheet on page 222 is a continuation of the dredge account commenced on the top ledger sheet on 222, the two sheets together forming the complete account. This is an open account with Coast Dredging & Construction, Ltd. The sole partners in Coast

Dredging & Construction, Ltd., are Hugh Corgan and his son, J. H. Corgan (219).

In the ledger account on page 222 the debits represent charges by the two Steinbachs against the two Corgans and the credits are the opposite, namely, credits to the Corgans as against the Steinbachs. The debits are sums paid out by the Steinbachs for the purchase price of the dredge, insurance premiums, repairs, including freight on parts, and wages to the Corgans. The credits are a return premium received from Mr. Knapp of \$415.74 and a small sum paid by Coast Dredging & Construction, Ltd. The balance of this open account against the Corgans and in favor of the Steinbachs is \$9446.26.

The court will notice that included in the charges by the Steinbachs against the Corgans are the various amounts borrowed by the Steinbachs from Frances Steinbach—\$1,000, \$675 and \$1,250, aggregating \$2,925. These three items will be found charged in favor of the Steinbach men and against the Corgans on the ledger page at the top of 222, and against the Steinbach men and in favor of Frances Steinbach on the ledger page on 223.

In the account with Frances Steinbach on 223, the return premium of \$415.74 appears as a credit to the two Steinbach men because this check was cashed by Frances Steinbach. The other credits on this account appear to be by checks of the Steinbach Iron Works, the numbers of which are shown on the

ledger sheet, payable to or for the benefit of Frances Steinbach for which the Steinbach men took credit on the account.

To summarize, the relationships to the dredge are as follows: Hugh Corgan owned the dredge, and the two Corgans possessed and operated it. The Steinbach men loaned money on an open account to the Corgans to buy and operate the dredge, and borrowed part of that money from Frances Steinbach, on a note account in order to lend it to them. Carolyn Steinbach had nothing at all to do with any of these money matters.

The three members of the Steinbach family who gave testimony injected into the record a good deal of sentimental talk designed to elicit the sympathy of the Trial Court and show him that the Steinbach men treat their wives generously, and that among the four members of the family a happy communal spirit prevails with respect to everybody's property. For instance, Frances Steinbach testified, on cross examination (178):

"They are all in the family. What difference does it make whether the debt is paid or not?"

This is not just what she said when her deposition was taken in June, 1946 (180):

"Q. You made it *before* they were honest men and good business men and you felt they would pay you back, is that right?

A. Yes."

(The word in italics should be "because". See Tillamook depositions, Exhibit 7, p. 38, line 14.)

David E. Steinbach testified (112) that all four of the Steinbachs "contributed" to the purchase price of the dredge. Frances Steinbach made the loan to Steinbach Iron Works that has been described. Carolyn Steinbach neither loaned nor paid anything. She so testified when her deposition was taken (Exhibit 7) and appellees did not put her on the witness stand at the trial. What Mr. Steinbach means is that generally the success of the dredge enterprise would contribute to the fortunes, prosperity and happiness of all of the Steinbachs. John L. Steinbach offered the pleasing but untrue doctrine: "Well, what's mine is hers" (99).

This Court cannot properly allow expressions such as these to govern its consideration of this case. This Court has a duty to construe the Oregon Statutes and give effect to the applicable decisions, and cannot allow its judicial determinations to be governed by such sentimental beatitudes as appear in this record.

POINTS, AUTHORITIES AND ARGUMENT

1. The dredge WISHRAM was a vessel and could be transferred only by a writing signed by the transferer under the Oregon statute. The dredge was not a "vessel of the United States" and, therefore, its

transfer was governed by the Oregon statute and not the United States statute. Parol evidence of transfer was erroneously received.

O. C. L. A. 2-907.

46 U. S. C. 921.

City of Los Angeles vs. U. S. Dredge Co. (C. C. A. 9), 14 Fed. (2) 365.

North River Coal Co. v. McWilliams (S. D. N. Y.), 28 Fed. (2) 513.

Ohl vs. Eagle Insurance Co. (C. C. Mass.), 18 Fed Cas. 10472-3.

Stockdale vs. Dunlop, 6 M. & W. 224; 151 Reprint 391.

The dredge WISHRAM was a "vessel". This has been clearly held by Judge Hunt in *City of Los Angeles vs. U. S. Dredge Co.* (C. C. A. 9), 14 Fed. (2) 365. If the dredge was a "vessel of the United States" any conveyance must be in writing under the Federal Ship Mortgage Act, 46 U. S. C. 921. If it was not a "vessel of the United States" any conveyance must be in writing under the Oregon statute, O. C. L. A. 2-907. *North River Coal & Wharf Co. vs. McWilliams Bros.* (S. D. N. Y.), 28 Fed. (2) 513.

The dredge was not a "vessel of the United States" within the meaning of 46 U. S. C. 921 because it was

not registered or enrolled. Therefore, it was governed by the Oregon statute 2-907 as to transfers. Title to the dredge passed from the Government to Captain Hugh Corgan by the letter (229), and remained there to the time of the loss. The Oregon statute of frauds is as follows:

“2-907. A sale or transfer of a vessel is not valid unless it be in writing and signed by the party making the transfer.”

The appellees never owned the dredge, as they alleged in their complaint, nor did their husbands own it. The Trial Court erred in admitting evidence that title came into the appellees through family conferences of the Steinbachs in which Captain Corgan was not even present. That Captain Corgan does not *now* claim any interest is beside the point.

Ohl vs. Eagle Ins. Co. (1826) (C. C. D. Mass.), 18 Fed. Cas. No. 10,472 and No. 10,473. Ohl procured a policy of insurance in his own name and after a loss brought suit. To establish his ownership of the schooner he produced a bill of sale from Hendricks to Ohl and Remington and a certificate showing registry in the names of Hendricks and Remington. He then sought to prove by parol that the purchase had been made on his sole account. This evidence was objected to and Mr. Justice Story said in his opinion on the Circuit:

“‘I am of opinion that the evidence is not admissible. I think that a title to a ship cannot pass by parol when she is sold to a purchaser.

The general maritime law requires a ship to have some written document of ownership at least when sailing on the ocean; and there is nothing in our jurisprudence which dispenses with such a written instrument of transfer. Lord Stowell has observed (*The Sisters*, 5 C. Rob Adm. 155 (438)) that a bill of sale is 'the universal instrument of transfers of ships, in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England.'

* * *

"I agree that an equitable interest is insurable. Whether it binds the underwriter to answer for any loss, when its peculiar nature is not disclosed and the terms of the insurance are strictly applicable to legal interests; and whether there would be any difference in such case, if the disclosure were not material to the risk, are questions upon which I give no opinion * * * Whatever may be the general rule on this subject, in ordinary cases, I am of opinion that an insurance on a ship is to be deemed, unless a special explanation is given, to be an insurance on the legal interest and not on a mere equitable interest as contradistinguished from the legal interest of the ship; and at all events not an insurance on a mere private, verbal trust, in opposition to the ship's papers and the overt acts of the parties. If such an interest is to be insured it ought to be disclosed'."

Justice Story then points out that the nature of the title must necessarily be material to the risk, asking what rights of salvage would the company have in the event of an abandonment by a (parol) owner,

not joined in by another whose title stands on a different footing.

2. A marine insurance policy is void where it purports to indemnify an assured against loss or damage to property in which the assured has no insurable interest.

7 O. C. L. A. 101-1119.

7 O. C. L. A. 101-1120.

Chase v. Hammond Lumber Co. (C. C. A. 9, 1935), 79 Fed. (2) 716.

Lowry v. Conn. Fire Ins. Co. (C. C. A. 2, 1934), 70 Fed. (2), 324, Rev. EDNY. 5 Fed. Supp. 325, Cert. Den. 293 U. S. 576.

In *Chase vs. Hammond Lumber Co.*, 79 Fed. (2) 716, the Ninth Circuit said:

“It is an elementary principle of marine insurance law that insurance cannot be created against injury to property in which the insured has no insurable interest and, as we have pointed out, no insurable interest of the Hammond Lumber Company in the Dolphins and light is alleged, * * *

On December 21, 1906 an Act was adopted in Britain to codify the law relating to marine insurance (6 Edw. 7, c. 41). In 1921 the Oregon legislature

adopted an Act for the same purpose (Laws 1921, ch. 354). The Oregon Act is almost an exact copy of the English Act; for the purposes of the present point, the two may be regarded as substantially identical both in wording and in meaning. The body of the policy involved in this case contains the usual provision:

“This contract shall be governed by the law of the United States of America as to its validity and the legality of the venture. It is otherwise subject to and shall be governed by English Law and Usage as to liability for and settlement of any and all claims.”

The American Hulls (Pacific) 1944 endorsement does not contain this or similar language and provides at its end that (66):

“The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being waived, except provisions required by law to be inserted in the Policy’.”

While the Oregon Law covers this case, the English Statute and applicable decisions may also be considered as related. The pertinent parts of the Oregon statutes are published in Appendix A to this Brief.

Sections 101-1119 and 101-1120 may be regarded by your Honors as fully disposing of this case. Section 101-1119, provides that every wagering contract of marine insurance *is void*; and that a wagering

contract is one where the assured has *no insurable interest* and does not expect to acquire one. Section 101-1120 defines insurable interest as a legal or equitable relation to the adventure under which one would be benefited by safety or prejudiced by loss.

Neither of the appellees had any legal or equitable relation to the dredge; they had a sentimental interest in it, but that is all. Carolyn Steinbach neither paid nor received any money. Frances Steinbach loaned money to her husband and his brother to help purchase and insure the dredge, but she received their unsecured note for this loan and they state that they will pay her back regardless of the outcome of this case. Neither lady stands in a legal or equitable relation to the dredge by which she would have benefited by its safe arrival or by which she is damaged through its loss.

Expectations for the future were that the dredge be owned by a corporation whose stock was to be owned by the two Steinbach men and the two Corgans.

The ladies neither owned at the time of the loss nor anticipated owning the dredge at any time in the future.

3. Since the statute of 19 Geo. 2, c. 37, 1751, outlawing gambling policies, it has been necessary, in an action on a marine insurance policy, for the plaintiff to allege facts showing ownership or other character of insurable interest.

Dollar S. S. Co. v. Maritime Ins. Co. (N. D. Cal.), 149 Fed. 616.

Hardwick v. State Ins. Co., 20 Or. 547, 26 Pac. 840.

Chrisman v. State Ins. Co., 16 Or. 283, 18 Pac. 466.

Cousins v. Nantes, 3 Taunt. 511, 128 Reprint 203.

In *Cousins v. Nantes*, 128 Reprint 203 it was held (207):

“On a wagering policy, there is no salvage, no abandonment, no return of premium for short interest * * * but it is the contrary on a policy on interest; * * *. Upon such a policy, therefore, we are of opinion, according to the practice of 60 years since the statute (19 Geo. 2, C. 37) that it is necessary to allege the interest in the declaration, in order that the defendant may see what that interest is, and in whom it is.”

In an action to recover upon a fire insurance policy, the Oregon Court said, *Chrisman v. State Ins. Co.*, 16 Or. 283:

“The plaintiff’s interest in the property covered by the policy, then, being one of the essential facts upon which his right to recovery depends, it must be alleged in the complaint; and without such allegation the complaint is fatally defective.”

Gambling marine insurance policies were outlawed nearly 200 years ago. It follows that since that time it has been necessary to aver in a complaint upon a marine policy the facts showing the insurable interest of the plaintiff.

The appellees have alleged ownership and this is the character of interest upon which the policy was issued (64). However, the record is destitute of evidence tending to show ownership and, indeed, the evidence shows without dispute that appellees never owned the dredge and never expected or intended to own it. A fatal variance exists between pleading and proof.

4. The burden is upon the assured of proving the same insurable interest alleged in his complaint—in this case, ownership.

Oatman v. Bankers, etc., Assn., 66 Or. 388, 133 Pac. 1183, Reh. den., 134 Pac. 1033.

Cohen v. Hannam, 6 Taunt, 101, 128 Reprint 625.

Catlett v. Pacific Ins. Co. (C. C. N. Y.), 5 Fed. Cas. No. 2517.

Bell v. Ansley, 16 East 141; 104 Reprint 1042.

In *Bell v. Ansley*, 16 East. 141, 104 Reprint 1042, the plaintiff sued to recover on a cargo policy alleging sole ownership of the goods in himself. The policy recited ownership in both plaintiff and his brother William Bell, and at the trial the evidence supported the policy.

The Court held that this variance between pleading and proof was fatal:

“This was a question of variance.”

★ ★ ★

“★ ★ ★ we are of opinion ★ ★ ★ the underwriters are entitled to have it stated truly upon the record whose interest the policy was to protect.”

★ ★ ★

“It certainly is material also, in point of public policy and convenience, that a disclosure of the true interest meant to be covered by the policy should be made ★ ★ ★.”

★ ★ ★

“Upon the ground, therefore, that it is a material allegation, namely: the allegation on whose account and for whose use and benefit a policy is made; and that the statement ought to be according to the truth; we are of opinion that the variance in this case was fatal, and that the rule for a non-suit should be made absolute.”

In a suit on a marine insurance policy, the plaintiff necessarily undertakes the burden of proving his insurable interest as alleged in his complaint, as he does the other material allegations of the complaint. The appellees have offered no evidence tend-

ing to prove their allegation of ownership. The evidence is to the contrary.

5. Where an assured causes a policy of marine insurance to be issued purporting to indemnify him *as owner* in respect to loss or damage to property of which, in truth he is *not the owner*, the policy is void.

Curacao Trading Co. v. Federal Ins. Co. (S. D. N. Y.), 50 Fed. Supp. 441. Aff'd C. C. A. 2, 137 Fed. (2) 911. Cert. Den., 321 U.S. 765.

National Oil Transp. Co. v. U. S. (D. C. La., 1927), 18 Fed. (2) 305.

Vancouver Nat. Bank v. Law Union Crown Ins. Co. (C. C. Or., 1907), 153 Fed. 440.

Finlon v. National Union Fire Ins. Co., 65 Or. 493, 132 Pac. 712.

In *Curacao Trading Co. v. Federal Ins. Co.*, 50 Fed. Supp. 441, the plaintiff sued on a floating import policy to recover for physical loss of a quantity of cocoa beans in a warehouse. The beans were determined to belong to others than plaintiff. The District Court said (443):

“The certificates issued to plaintiff gave him no interest in any cocoa beans in the warehouse. They were nulities as documents evidencing any right to possession or ownership of any of

the merchandise described in them. * * * Another owned all of the merchandise in the warehouse and had a right to immediate possession absolute as against this plaintiff."

In *Vancouver National Bank v. Law Union & Crown Ins. Co.*, 153 Fed. 440, 453, it was held that where one Cone, indebted to the bank had taken a policy of insurance as owner with loss payable to the bank and then subsequently, but prior to its loss by fire, conveyed the insured property to a corporation the policy was avoided. Judge Wolverton said:

"So that there can be no question, under the contract and under the evidence, that the sale was absolute and not conditional, that it took effect at once to transfer the equitable title, and that the loss by the fire fell upon the Oregon Fir Lumber Co., and not upon Cone, and as the contract had the effect to violate the condition of the policy, it relieved the insurance company of all liability thereunder."

In *Finlon v. National Union Fire Ins. Co.*, 65 Or. 493, the plaintiff, having only a lease with an option to buy, procured a policy of fire insurance as owner. A loss occurred and the Court said:

"The lease, with the lessee's option to purchase, does not in any sense of the word vest him with fee simple title to the land on which the insured building stood. There being no agreement to the contrary indorsed upon the policy or added thereto as required by the statute, that instrument was shown to be void, making plaintiff's case amenable to the objec-

tion urged by the motion for non-suit. In this respect, if in no other, the plaintiff failed to prove a case sufficient to be submitted to the jury under the allegations of his complaint."

At the conference at which this insurance policy was ordered, Mr. Steinbach told Mr. Knapp that the appellees had bought the dredge in their names, with their money and were the owners thereof. The policy then issued naming the appellees as owners and not in any other capacity. The appellees have alleged in their complaint that they were the owners and an issue has been created on this allegation.

Even if appellees had shown some insurable interest in themselves other than ownership, which they did not, they could not recover on this policy on the basis of the pleadings in this case. The policy names them as owners; they have pleaded that they are owners; they could recover in no other capacity than as owners.

6. Failure of an assured to disclose to the insurer his true interest in any proposed risk, or a misrepresentation by an assured to an insurer of his interest therein avoids a policy of marine insurance.

7 O. C. L. A. 101-1132.

7 O. C. L. A. 101-1134.

Ohl v. Eagle Ins. Co. (C. C. Mass. 1826), 18 Fed. Cas. No. 10,473.

National Oil Transp. Co. v. U. S. (D. C. La., 1927), 18 Fed. (2) 305.

Murphy v. Old Dominion (E. D. N. C.), Fed. Cas. 9945.

In *Ohl v. Eagle Ins. Co.*, 18 Fed. Cas. No. 10,473, the assured sought to recover on a policy for loss of a ship, the papers of which disclosed assured to be a joint owner with one Remington. Assured attempted by parol to show himself the sole owner. The Court states:

“No one has a right to say, that the true character of the ship and the representation of the genuine interest of the parties to the insurance are not, or may not be material to the underwriter in estimating his risk * * * In what manner could the underwriters, in this very case, assert an exclusive ownership upon an abandonment against Remington? The effect of the acts of the master, being a part owner, might be very important in the consideration, not only of questions of peril and revenue, but of the general conduct of the voyage. If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose, that the parties deal with him upon the naked avowal of legal titles.”

In *Murphey v. Old Dominion Ins. Co.*, Fed. Cas. No. 9,945 beneficiaries of an estate made representation that they were the absolute owners and this was held to vitiate a policy.

The reason the policy was issued to the appellees as owners is that J. L. Steinbach and Captain Corgan ordered it that way. Mr. Knapp said it is not a custom in the insurance business to question the truth of disclosures and representations of this kind (205). There is a good reason for this; the law

is very strict in requiring the truth of a prospective insured in his statement to the agent of the insurance company. The nature of the insured's interest in the subject matter is certainly material to the risk.

The liability of the underwriter is different for different kinds of insurable interests. Where the interest is that of lien claimant, the insurance company is liable only to the extent to which the assured is unable to collect from the debtor, and having paid the loss, is subrogated to the lien. In such a case, in the event of a constructive total loss, the assured would be unable to abandon to the underwriter, because a lien creditor has no title to transfer. Where the interest is ownership, the underwriter is liable for the full amount of the insurance, but in the event of constructive total loss, he would be entitled to such salvage value as might inhere in the vessel. The underwriter is entitled to know where he stands and what interest he is insuring. He is entitled to have the truth told to him as a basis for issuance of the policy.

We might add a line about the quotations from *Cousins vs. Nantes*, supra (34) and that from *Ohl vs. Eagle Insurance Co.* (40) to the effect that on a wagering policy there is no salvage or abandonment. One of the definitions of a wagering policy (O. C. L. A. 101-1119) is a policy made "without benefit of salvage to the insurer."

Let us suppose this dredge on the beach, intact, and a claim by the appellees against the company based on a constructive total loss. Let us suppose that the insurance company has a prospect who is willing to buy the dredge, where is and as is, for one-half of the amount named in the policy, and the company is anxious to pay the claim, accept the abandonment, sell the salvage and reduce its loss by one-half.

Since the appellees did not own the dredge, they could not transfer a good title to the company, which, in turn, could not give a good title to its prospective purchaser. Therefore, the company is in the position of having issued a policy "without benefit of salvage" on a risk where there is a possibility of salvage.

This is one example of the operation of a wagering policy or a policy without benefit of salvage to the insurer.

The prohibition against the issuance of gambling policies rests as heavily upon insurance companies as upon assureds who seek to obtain policies where they have no interest. The law, with good morality and reason, forbids an insurance company from contracting away its possibility of salvage.

It is no answer to the above problem of salvage that Captain Corgan might have joined in a bill of sale to the Wishram under the circumstances outlined. The point is that Captain Corgan, not being

an assured, could not be obligated to join, and nobody knows whether he would or would not have joined.

In this connection, we refer the Court to the case of *Ohl. vs. Eagle Insurance Co.*, ()

Justice Story saw very clearly the outcome of treating as lawful and binding a policy of marine insurance where the insurable interest rested on nothing more firm than a trust claimed to exist by parol. Such a policy would be a wagering policy.

On the subject of disclosure by the assured please see also the cases cited under point 14 infra.

7. Husband and wife under Oregon law, maintain separate status as regards ownership of property and neither has an insurable interest in the property of the other.

Price v. United Pacific Co., 153 Or. 259, 56 Pac. (2d) 116.

Oatman v. Bankers Fire Assn., 66 Or. 388, 133 Pac. 1183.

Mercantile Ins. Co. v. The Orphan Boy (N. D. Oh.), Fed. Cas. 9431.

The case of *Price v. United Pacific Co.*, 153 Or. 259, was an action by plaintiff on a policy of burglary insurance. The loss was of a diamond ring belonging to plaintiff's wife. The Court, after reviewing authorities, said:

"It follows from the above that, in our opinion, the complaint does not allege a cause of

action in favor of Mr. Price, and that the evidence does not disclose one in his favor. He was not the owner of the ring and had no insurable interest in it."

In *Oatman v. Bankers Fire Relief Assn.*, 66 Or. 388, the action was on a fire policy issued to plaintiff covering house and personal property. The evidence disclosed that the deed to the premises went to the plaintiff's wife. The Court held that the insured could not recover as his interest in his wife's property was not an insurable one. The Court said (392):

"The plaintiff H. M. Oatman has no insurable interest in said real property on which the house was located * * *. A person has an insurable interest in property only when the conditions are such that he will lose in case the property should be burned (citing authorities).

* * *

"In this state a husband has no insurable interest in his wife's property."

Oregon's Community Property Law is not involved in this case. Chapter 525, Oregon Laws, 1947, went into effect July 5, 1947, long after the facts in this case arose.

Under the Oregon Constitution, Article XV, Section 5, and the married women's property acts of Oregon (O. C. L. A., 63-202 to 206) a married woman of this state owns her property separate and apart from that of her husband, and it is not subject to levy for his debts. She does not, however, have any rights in her husband's separate property, and it is not subject to her debts.

This concept has been clearly established in this state in the above cases defining insurable interest. The husband has no insurable interest in his wife's property, nor has the wife an insurable interest in the husband's property.

The laws of dower and curtesy are not involved here, they relate to real estate and not to personal property. Whether an inchoate right of dower is insurable need not be decided in this case. Certainly if it is, the policy must define it as such. A married woman seeking to insure her inchoate right of dower in her husband's real property cannot do so by representing to the insurance company that her interest is an absolute property right.

8. In Oregon there is no joint tenancy of personal property. Dual or multiple tenancy in personal property is in common.

Manning v. U. S. National Bank, 174 Or. 118, 148 Pac. (2d) 255.

Nunner v. Erickson, 151 Or. 575, 51 Pac. (2d) 839.

Stout v. Van Zante, 109 Or. 430, 219 P. 804, 220 P. 414.

Is the judgment in this case in favor of the appellees a joint or a several judgment? The answer is not to be found in the judgment itself (54). The Oregon law says they own the judgment in common, one-half to each. The record in the case says something about children in the Steinbach families. Suppose Carolyn Steinbach were to die intestate, would

her children acquire all or one-half of this \$11,000 right which has been created in her name by the District Judge out of nothing but family talk. If she has a right in common what is the extent of that right? If a moiety, why? She put up nothing.

9. A part owner has no insurable interest in the shares of other part owners:

Graves v. Boston Mar. Inc. Co., 2 Cranch 419,
2 L. ed. 324.

Murray v. Columbia Ins. Co., 11 Johns (N. Y.)
302.

Even if Frances Steinbach, despite the authority to the contrary, were to be considered as having an insurable interest to the extent of \$1650 (and it could not possibly be considered greater) Carolyn Steinbach could not sue upon that interest.

10. One who advances money to another for the purchase of property is merely a general creditor, and does not acquire a lien on the property. This rule holds good where the property thus purchased is maritime in character.

Shooters Island Co. vs. Standard Shipbuilding Corp (C. C. A. 3, 1923), 293 Fed. 706.

The Guiding Star (D. C. Ohio, 1883), 18 Fed.
263.

The Sarah Harris (C. C. N. Y., 1876), 21 Fed.
Cas. No. 12,346.

John L. and David E. Steinbach advanced money to Captain Corgan to buy and insure the dredge, but

did not thereby acquire any lien upon the dredge. Frances Steinbach advanced money to the two Steinbach men to aid them in making their advances. She did not thereby acquire any lien on the dredge.

11. A general creditor of an owner of property has no insurable interest in the property.

Vancouver National Bank v. Law Union Ins. Co. (C. C. Or. 1907), 153 Fed. 440.

American Equitable Assur. Co. v. Powderly Coal Co., 221 Ala. 280, 128 So. 225.

In *Vancouver National Bank v. Law Union Co.* (D. Or.), 153 Fed. 440, one Cone doing business as a lumber company obtained a policy of insurance and had it made payable to the plaintiff bank who was his general creditor. The Court states:

“It is first contended that the plaintiff cannot recover, for the reason that it is without an insurable interest in the property covered by the policy of insurance. Under the testimony, and by the explicit admission of the parties, the plaintiff had not at the date of the policy, nor has it now, any other interest in the subject of the insurance except as a general creditor. It had not then, nor has it now, any mortgage or judgment but holds the promissory notes of Cone * * * for moneys loaned or advanced, so that it stands absolutely as a general creditor * * * without an insurable interest.”

In *American Equitable Assur. Co. v. Powderly Coal Co.*, 221 Ala. 280, the Alabama Court in an ac-

tion on a fire policy stated the rule:

“It is further recognized in this state that a simple contract creditor without a lien of any character, * * * has not an insurable interest in the property of his debtor.”

The two Steinbach men, as co-partners in the Steinbach Iron Works, are general creditors of Captain Hugh Corgan and his son, doing business as Coast Dredging & Construction, Ltd., to the extent of \$9,446.26 (222). Frances Steinbach is a general creditor to the extent of \$1,650.00 of Steinbach Iron Works (Exhibit 7 (4) 223; Exhibit 7 (11) and 7 (14) 223). Captain Hugh Corgan took the title to the dredge from the government and held that title up to the time of the loss. Under the general creditor authorities, above cited, the Steinbach men had no insurable interest in the dredge, and even if they had owned the dredge, Frances Steinbach would have no insurable interest in it. Carolyn Steinbach was not a general creditor of anybody.

Aside from all this, the policy was issued to the two ladies as owners of the dredge, not as creditors of anybody, and they alleged in their complaint that they were the owners of the dredge.

12. Where the claim of a creditor is secured by a lien upon the debtor's property the creditor's lien interest is insurable, but upon the destruction of the property by a peril insured against, the assured creditor cannot recover from the insurer without alleging and proving that the debtor has no other prop-

erty out of which the creditor can recover the amount of his claim, for only under these conditions can the assured be said to have suffered from the destruction of his debtor's property.

Spare v. Home Mutual Ins. Co. (D. C. Ore.),
15 Fed. 707.

In *Spare v. Home Mutual Ins. Co.*, 15 Fed. 707, the action was to recover on a fire policy. Plaintiff obtained and docketed a judgment against Lurch, who owned a warehouse, and thereafter secured from defendant a policy of insurance on the warehouse. The warehouse was burned.

Judge Deady said:

“The contract for insurance being one for indemnity only it follows that, while the judgment creditor may insure himself against loss by injury from the fire to the whole or any part of his security, — the property upon which his judgment is a lien, — yet before he can recover on such contract as for a loss sustained by the peril insured against it, it must appear that at the time of the fire the amount of the judgment could not have otherwise been made on an execution against the property of the judgment debtor. If notwithstanding the injury to the debtor's property by fire, he has sufficient left, out of which the judgment may be made, the creditor has sustained no loss, and can recover nothing from the insurer. His contract was against loss to himself by fire, not his debtor.”

Judge Deady's decision is significant because it shows how far removed are these appellees from having an insurable interest in the dredge. If Fran-

ces Steinbach had had a lien on the dredge securing her promissory note signed by Steinbach Iron Works, she would have had, at the time of the loss, an insurable interest to the extent of \$1,650 only, since the note had been paid down to that figure prior to the loss (223). But, in order to recover on the policy, it would be necessary for her to allege and prove that the two Steinbach men had no other property out of which she could collect the balance of her note. Not only did she not allege this as a fact or offer any evidence in support of it, but John L. Steinbach says she is going to be paid regardless of the outcome of this case (97). Steinbach Iron Works got their settlement from the Maritime Commission prior to June 1945, amounting to \$29,000 (118), and the evidence indicates that they were solvent when the loss occurred.

13. This action is not prosecuted by the real party in interest.

Rule 17 (a) Federal Rules of Civil Procedure.
Capital Fire Ins. Co. v. Langhorne (C. C. A. 8), 146 Fed. (2) 237.

The case at bar is not one where the policy expressly provides that the loss, if any, shall be payable to some person other than the assured, as such other person's insurable interest may appear. Under our policy, the loss is payable only to the assureds as owners. The case of *Capital Fire Ins. Co. v. Langhorne* (C. C. A. 8), 146 Fed. (2) 237, 243, correctly applies Rule 17a to a situation where a vendee

of real property insured it for the benefit of the vendor as the vendor's insurable interest appeared. This was a contract for the benefit of a third party, valid under Minnesota law, and the Court held that the vendor, suing for his own interest, was the real party in interest under Rule 17a to the extent of his interest.

Captain Corgan had the only interest in the dredge capable of being insured.

The appellees have a judgment for \$11,437.50 exclusive of interest, costs and attorney's fees. No evidence whatever tends to show that, if they collect the judgment, they will keep any part of the money, unless by gifts from their husbands. Carolyn Steinbach has nothing coming whatever from anybody. Frances Steinbach will be repaid her \$1,650 even if this Court reverses this case. We think it is a fair inference from all the testimony that if this judgment is collected Captain Corgan will pay Steinbach Iron Works \$9,446.26 out of the proceeds and will claim the balance.

The appellees are not the real parties in interest.

DISCLOSURE

14. Failure by the assured, during the negotiations for a policy, to disclose to the insurer every circumstance known to him and material to the risk, avoids the policy, even in the absence of intent to deceive.

7 O. C. L. A. 101-1132.

7 O. C. L. A. 101-1133.

Btresh v. Royal Ins. Co. (C. C. A. 2, 1931), 49 Fed. (2) 720

King v. Aetna Ins. Co. (C. C. A. 2, 1931), 54 Fed. (2) 253.

California Rec. Co. v. New Zealand Ins. Co.,
23 Cal. App. 611, 138 Pac. 960.

Riley v. Delafield, 7 Johns (N. Y.) 522.

In *King v. Aetna Ins. Co.* (C. C. A. 2), 54 Fed. (2) 253, concealment of over-valuation of a yacht was held to be such as to avoid the policy.

In *Btresh v. Royal Ins. Co.* (C. C. A. 2), 49 Fed. (2) 720, the plaintiff insured a shipment of silk as silk but failed to disclose to the insurance company that he had declared it to the carrier as cotton. This failure voided his policy, it being shown that the carrier ordinarily exercised more care in the custody of silks than with respect to cottons.

The Court stated the rule thus (721):

“The assured under a marine policy must disclose to the underwriter all the circumstances known to him which materially affect the risk.

* * *

“It is not necessary that the assured should intend a fraud upon the underwriter; his duty is positive to disclose.”

John L. Steinbach and Captain Hugh Corgan negotiated the policy on behalf of the appellees. Under the facts of this case, the appellees could not repudiate their authority to act as their agents within the

meaning of O. C. L. A. 101-1133. They withheld from the insurance company "circumstances" which it was their duty to disclose:

First, that the appellees did not own the dredge, but were taking the insurance in their names so that in the event of a loss the creditors of the Steinbach Iron Works could not levy on the money; that Captain Corgan owned the dredge, and it was intended, in the future, that the dredge be owned by a corporation whose stock should be owned 32% to each of the two Steinbach men and Captain Corgan and 4% to J. H. Corgan (Corgan, 137). All of these facts were material to the risk and should have been considered by any prudent underwriter prior to accepting the risk. Mr. Knapp says that if they had been known to him that he would not have issued the policy in the names of the two ladies (198). Whether the company would have accepted the risk at all had these circumstances been disclosed to it does not appear. (See point 6, *supra*.)

Secondly, appellant contended in the Lower Court that Mr. Steinbach and Captain Corgan did not disclose that the towage was to be made by the fishboat Julia D, instead of the approved tug Umpqua Chief, but the Court has determined that point against appellant on disputed evidence and we do not raise it again.

Thirdly, no disclosure was ever made to the company or its agent that towage was to be made with a hawser "borrowed" from the storage loft of the

Coast Guard (202). If such a disclosure had been made, Mr. Knapp would have insisted upon a survey of the whole venture (202), which would have disclosed that Captain Corgan contemplated towage by a fishboat and not by a tugboat approved by the Board of Marine Underwriters.

We will refer back to the matter of the hawser in a later portion of our brief.

These matters in respect to which there was a failure to disclose, namely, the ownership and financial arrangements, and the borrowed hawser, were circumstances material to the risk which should be considered by a prudent underwriter. Mr. Knapp's testimony (195-203) makes this entirely clear and is undisputed.

15. A misrepresentation by the insured during negotiation of the policy of a matter material to the risk avoids the policy if not true, regardless of whether or not the assured intended to deceive the insurer.

7 O. C. L. A. 101-1134.

Bella S. S. Co. v. Ins. Co. of S. Am. (C. C. A. 4, 1925), 5 Fed. (2) 570.

Wathen v. Public Fire Ins. Co. (C. C. A. 2, 1932), 61 Fed. (2) 962.

Kerr v. Union Mar. Ins. Co. (C. C. A. 2, 1904), 130 Fed. 415.

In *Wathen v. Public Fire Ins. Co.*, 61 Fed. (2) 962, 964, where the insured represented that the vessel

was in port when in fact she had already started her voyage and because of bad weather returned to the breakwater, the Court said:

“We do not suggest nor do we believe that any fraud was intended by plaintiffs or their broker in the application for the policy, but we hold that in stating that the Lottie was ‘in port’ there was a misrepresentation sufficient to avoid the policy.”

John L. Steinbach and Captain Corgan not only failed to disclose to Mr. Knapp that the dredge was owned by Captain Corgan and that it was contemplated that it should be eventually owned by a corporation, whose stock should be owned by the two Steinbach men and Captain Corgan and his son, but they actually misrepresented the facts in this respect when they represented that the dredge was owned by the two ladies. The statute is entirely clear that misrepresentation of a material circumstance voids the policy regardless of intent to deceive.

SECOND SPECIFICATION OF ERROR: DREDGE UNSEAWORTHY BECAUSE OF DEFECTIVE HAWSER

The court erred:

(1) In failing to hold that the dredge was unseaworthy at the commencement of the voyage in that it was equipped with an insufficient towing hawser.

(2) In failing to deny recovery to the appellees on account of breach of an implied warranty of the pol-

icy that the dredge should be seaworthy at the commencement of the voyage.

(3) In holding that the insufficiency of the hawser with which the towage was attempted was not chargeable to the operators of the dredge.

The appellant in Paragraph XVI of its answer (37) alleges as follows:

“At the time of said attempted towage of the dredge ‘Wishram’ from Nehalem Bay to Tillamook Bay, the said dredge ‘Wishram’ was equipped with said borrowed hawser and the said hawser was insufficient for the purposes of said towage and the said fact was fully known or should have been known to the said Captain Hugh Corgan. Consequently the said dredge was then and there unseaworthy and said unseaworthiness was within the knowledge or privity of the owner or owners of said dredge.”

The appellees filed no pleading responsive to this answer; therefore, we are probably to assume that the above allegation is deemed denied.

The Court found as finding of fact VIII (49):

“That the said suction dredge ‘Wishram’ was seaworthy at the commencement of the said voyage.”

The reason for this finding, as will later appear, is that the Court, as a matter of law, considered the defective hawser to be a part of the equipment of the fishboat, not of the dredge. There is no contradictory evidence on this legal issue.

STATEMENT OF FACTS

In July, 1945, on the towage from Coos Bay to Nehalem Bay the tug Umpqua Chief furnished the hawser which was ample and was a 6-inch hawser (Captain Corgan, 137). The tug also furnished the steel bridle.

Mr. Rathbun surveyed the dredge about October 17, 1945, to determine its fitness for the towage from Nehalem Bay to Tillamook Bay (Rathbun, 188). The dredge had no hawser at the time. Rathbun then thought the towage would be done by the Umpqua Chief with its own hawser.

The day before the towage took place, Captain Corgan and J. H. Corgan made arrangements with Otto Berg, Jr., for the towage. When his deposition was taken, Captain Corgan said he made this arrangement three weeks before the towage and that afterwards he had to wait for the weather (Corgan, 138). At the trial he changed his testimony and claimed he was negotiating with the Faymar, another fishboat, during that period of three weeks (138-139).

Neither Captain Corgan nor J. H. Corgan told anybody on behalf of the insurance company that this towage was to be undertaken with a hawser borrowed from the Coast Guard (Captain Corgan, 148; J. H. Corgan, 162).

On October 31, 1945, just before lunch, the two Corgans drove to Otto Berg's house at Bar View and

proposed the towage (149). Berg said he would do the job for \$150 and \$25 extra for another man, but that he had no towing hawser (150). Berg asked J. H. Corgan how much the Umpqua Chief would charge, and he said around \$500 (Berg, 189).

Since Berg had no hawser, Captain Corgan told him he would undertake to get one. The Corgans had made a bridle by themselves for the dredge (J. H. Corgan, 154). Captain Corgan and his son contacted a man named Ole Johnson about getting a hawser. Johnson was a former member of the Coast Guard station at Garibaldi on Tillamook Bay, and had been discharged (J. H. Corgan, 155).

Captain Corgan said that since Mr. Berg had no tow line (125):

“No, he had no towlines, so I figured that any towline that the Coast Guard would recommend was good enough for me, and, so, Ole Johnson—he was just retired from the Coast Guard—went in and looked into that and made arrangements for a towline, and he pronounced the towline ‘A’ Number 1, and it had just been taken off a Coast Guard boat.”

Appellees did not produce Ole Johnson as a witness but Captain Corgan said about him and the hawser in question (147):

“He handled every inch of that line when it went over the boat.”

Chief Boatswain Paris was head of the Coast Guard Station. Both Captain Corgan (146) and J. H. Corgan (158) were acquainted with Boatswain

Paris, but neither one of them asked him for the loan of a hawser. Captain Corgan admitted (147):

“To your knowledge, did Mr. Paris have any knowledge that the hawser was being taken out of the Coast Guard station and used for this towage?

A. I wouldn't say that he did.”

J. H. Corgan also admitted the lack of authority to take the hawser, and said (158):

“Nobody ever gave us permission, no.”

After talking to Mr. Berg and rounding up Ole Johnson, the latter and J. H. Corgan and Orville Boster, leverman on the dredge, went to the Coast Guard boat house, which stands on piling in Tillamook Bay at Garibaldi. There is another Coast Guard station on land, up on the hill near the road. These men went to the boat house (157) and up in the loft, where they picked out a hawser (151).

A piece of this line is in evidence and is before this Court as Exhibit 20 (Wyatt, 217; Berg, 218). It shows signs of much wear.

When they had selected the hawser, J. H. Corgan went back and told Otto Berg, Jr., who then came to the boat house with his fishboat, the Julia D. J. H. Corgan returned to the boat house with Boster and the two paid the hawser out of the window from the loft upstairs to the deck of the Julia D below (151-152).

J. H. Corgan testified (161):

“Q. And Berg coiled it on the boat?

A. Yes, sir.

Q. Johnson was not with you that second time?

A. No, sir.

Q. Johnson did not put his hands on any Government property?

A. Not at that time, no, sir.”

The Julia D undertook the towage the next day, November 1, 1945, with this hawser, and it broke four or five times (Otto Berg, 190).

The story of the attempted towage appears in appellee's Exhibit 39 (242-248). The distance from Nehalem Bay to Tillamook Bay is only 11 miles. The Julia D started with the dredge at 9:45 a.m., November 1, 1945, and arrived outside Tillamook Bay at 1 p.m., the towline having broken once on the way. The fishboat made several efforts to pull the dredge over the bar and each time the towline broke. The Coast Guard boat stood by all day. At 4 p.m. the Coast Guard boat returned to the boat-house and secured a new 4-inch hawser approximately 600 feet long. By that time the velocity of the south wind had increased, the tide was flooding and the sea was heavy (245). Some time after 6:37 p.m., the dredge was blown onto the north jetty. The new towline then broke and the dredge went to pieces.

It is beyond dispute that the dredge started on this voyage in an unseaworthy condition because of the defective towline “borrowed” from the Coast Guard by the Corgans.

Before the Court made findings of fact and conclusions of law and entered its final decree, the appellant moved to reopen the case for the purpose of admitting testimony of two witnesses, Orth Mathiot (43-44), an experienced tugboatman, and K. A. Webb (45), marine surveyor for the Board of Marine Underwriters. Each of these men made an affidavit (44-45) that he had examined the piece of hawser in evidence in this case (Exhibit 20, p. 217, 218) and would testify that it was insufficient for the purpose of this towage. This is the hawser that broke four or five times (190).

This application was heard by the Trial Court June 23 and was denied upon the sole ground that as a matter of law the hawser was a part of the equipment of the fishboat Julia D and not of the dredge. (This Brief, Appendix B.) (Supplemental Transcript.) (45-46.)

On this branch of the case the evidence is undisputed to the following effect: Otto Berg, Jr., Skipper of the Julia D, had no hawser and furnished no hawser for this towage. Captain Hugh Corgan, manager of the dredge, had no hawser of his own or belonging to the dredge. Through the connivance of Ole Johnson, discharged Coast Guardsman, and without the knowledge of the proper Coast Guard officials, Captain Hugh Corgan and his son arranged to get some old hawser out of the loft of the Coast Guard boat house. Otto Berg, Jr., commenced the towage using this hawser, which broke four or

five times. The breaking of this hawser delayed the voyage and the wind and seas rose. The wind blew the dredge onto the rock jetty.

POINTS, AUTHORITIES AND ARGUMENT

1. A policy of marine insurance may embody both a time policy and a voyage policy.

O. C. L. A. 101-1139.

The policy in suit is such a policy (62). It purported to be effective for a year beginning June 6, 1945. At first the dredge was warranted laid up at Coos Bay (66), then on a voyage from Coos Bay to Nehalem Bay (66), and at Nehalem Bay. Finally the policy covered by indorsement of October 26, 1945, (11,232), on another voyage in tow of the Tug Umpqua Chief from Nehalem Bay to Tillamook Bay.

In this one policy are two time covers interspersed with two voyage covers. The claim in this case is made on one of the voyage covers. The policy sued on is a voyage policy, covering the dredge in tow of the Tug Umpqua Chief from Nehalem Bay to Tillamook Bay.

2. A warranty is a stipulation forming a part of a policy of marine insurance, and is construed as a condition. Warranties unless strictly complied with will invalidate the insurance, regardless of proximate loss.

Snyder v. Home Ins. Co. (D. C. N. Y., 1904),
133 Fed. 848.

*Fidelity-Phoenix Ins. Co. v. Chicago Title and
Trust Co.* (C. C. A. 7, 1926), 12 Fed. (2) 573.

Levine v. Aetna Ins. Co. (C. C. A. 2, 1943), 139
Fed. (2) 217.

In *Snyder v. Home Ins. Co.*, 133 Fed. 848, the action was on a marine insurance policy which contained the provision that the canal boat should have a watchman. There was none. The boat sank from unknown causes. The Court denied recovery stating:

“In any case of breach of an express warranty in a policy of insurance bars a recovery whether it cause any injury or not.”

In *Levine v. Aetna Ins. Co.*, 139 Fed. (2) 217, the action was on a marine policy to recover for loss of life by drowning. The policy provided that the motor boat be equipped with a search light. It was not so equipped. The want of a search light could not have contributed to the drowning. The Court denied liability on the policy, holding:

“Compliance with the warranty was a condition precedent to liability and afforded a complete defense irrespective of any question of causation.”

The Oregon statute codifying the law of marine insurance, of which sections are printed in Appendix A to this brief, includes no section on warranties. However, Section 101-1170 provides that the rules

of the common law, including the law merchant, shall apply to contracts of marine insurance in Oregon except where they are inconsistent with the express provision of the statute. Therefore, we assume that the common law of warranties of marine insurance policies is in force in the State of Oregon. There is certainly nothing within the scope of the Oregon statute which is inconsistent with this set of rules.

See note on English law, Appendix C.

Assuming that the furnishing of a defective hawser by the operators of the dredge for the towage from Nehalem Bay to Tillamook Bay was a breach of an implied warranty of seaworthiness of the dredge at the commencement of the voyage, this would void the policy without a showing that the defective hawser contributed in any way whatever to the loss. However, it is quite clear that the many breaks of the defective hawser did so contribute by so extending the time of the towage until the south wind arose and blew the dredge onto the jetty at the north entrance to Tillamook Bay.

3. The policy in suit is subject to an implied warranty that at the commencement of the towage the dredge was seaworthy.

Hazard's Admin. v. N. E. Marine Ins. Co., 8 Pet. 557, 8 L. ed. 1043.

Eagle Star Ins. Co. v. Geo. A. Moore Co. (C. C. A. 9, 1925), 9 Fed. (2) 296.

City Motor Trucking Co. v. Franklin Ins. Co., 116 Or. 102, 239 Pac. 812.

New Orleans T.-M. R. R. Co. v. Union Marine Ins. Co. (C. C. A. 5, 1923), 286 Fed. 32.

Stetson v. Ins. Co. of North America (D. C. Pa., 1914), 215 Fed. 186.

Carey v. Home Ins. Co., 235 N. Y. 296, 139 N. E. 274.

In *Hazard's Admin. v. N. E. Marine Ins. Co.*, 8 Pet. 557, 579, the action was on a marine insurance policy covering the whaler Dawn on a long voyage in the Pacific. The Dawn struck a rock and it then appeared that the hull was perforated by worms and had become rotten. Denying recovery, the Court said:

“In every policy there is an implied warranty of seaworthiness, and this is a condition precedent on the part of the insured. The policy does not attach unless the vessel be properly manned and provided with all necessary stores and in all respects fit for the intended voyage. The equipment of the vessel must depend on the nature of the voyage; * * *

In *Eagle Star Ins. Co. v. Geo. A. Moore Co.* (C. C. A. 9), 9 Fed. (2) 296, the policy covered goods “Whether on board or not on board which may arise from any cause whatever,” for a period of one year. Under these circumstances this Court held that a warranty of seaworthiness was not to be implied as to the vessel in which the goods were carried to New Zealand. Justice Rudkin said, however:

“It will be conceded, of course, that there is an implied warranty of seaworthiness at the

inception of the voyage as a necessary incident to every contract of marine insurance, * * *

In *City Motor Trucking Co. v. Franklin Ins. Co.*, 116 Ore. 102, the plaintiff sued on a policy of marine insurance for loss of rock which had spilled from a barge. The Oregon Court denied recovery quoting Hughes on Admiralty (105):

“In every voyage policy of marine insurance there is an implied warranty that the vessel is in all respects seaworthy, and such warranty can be excluded only by clear provisions of the policy * * *

The Oregon Court continued in its own language (105):

“This principle seems to have been unanimously applied by the courts to all cases involving claims under marine insurance policies (citing authorities).”

In *New Orleans T.-M. R. R. Co. v. Union Marine Ins. Co.*, 286 Fed. 32, 34, the evidence disclosed that at the time of loading the cargo, calking in the seams above the water line had been permitted to dry out leaving the seams open. The barge filled with water and sank. The Court said:

“In policies where the law will imply generally a warranty of seaworthiness, it can only be excluded by terms in writing in the policy in the clearest language. *Arnould on Marine Insurance* § 686.”

* * *

“Here the evidence showed that no peril of the river, but the unseaworthiness of the barge

caused the loss. Unquestionably the barge sank from water entering through open seams.”

Stetson v. Ins. Co. of North America, 215 Fed. 186, was an action on a marine policy for loss of cargo on board a schooner which started a voyage in a leaky condition. The Court held:

“There is no principle of marine insurance better settled than the one which declares that in every insurance upon a vessel there is an implied warranty upon the part of the assured that at the time of sailing the vessel shall be seaworthy for the voyage insured. This implied warranty is not confined to the sufficiency of the hull, but in a sailing vessel extends to the soundness of the sails and rigging * * *.”

A warranty implied in law is just as real as an express warranty and has the same effect. It is a condition precedent to the attachment of the risk and to liability on the policy. It is not necessary to have a misrepresentation or a failure to disclose as the basis of an implied warranty of seaworthiness. When the owners of a vessel or of a cargo to be loaded thereon talk about insurance on such vessel or cargo with the representative of an insurance company the word “seaworthy” is seldom mentioned and need not be mentioned. The authorities from the earliest time assume that the applicant for insurance intends that the venture shall be seaworthy and that the underwriters so understand and believe. Where the insurance is upon a vessel it is within the power of the applicant for insurance to see that the vessel is seaworthy at the start of a voy-

age by making proper repairs or purchasing proper equipment, *such as a sound hawser*. It is never within the power of the underwriter to do this. The premium is computed and charged on the basis that the assured warrants the vessel to be seaworthy and that the underwriter understands it to be seaworthy.

The Appellate Court may consider the foregoing authorities conclusive on this branch of the case. The operators of the dredge secured the hawser and furnished it for the towage. The operator of the fishboat merely used the hawser furnished by the dredge. By the conduct and actions of the parties the hawser became a part of the equipment of the dredge, and it was no part of the equipment of the fishboat. The hawser was defective; therefore, the dredge was unseaworthy.

However, it may be necessary to answer the point of view put forward by the appellees and the Trial Court. This reasoning is so loose it hardly requires an answer. It is to the effect that the fishboat used the defective hawser and, therefore, although this hawser was furnished by the dredge, the operators of the fishboat as between them and the operators of the dredge became responsible for its defectiveness. The conclusion is made to follow that the operators of the dredge, as between them and the insurance company became absolved from the onus of having furnished the dredge with a defective hawser. In this way the Court blinded himself to the obvious fact that the hawser was a part of the

equipment of the dredge, and ignored the many authorities holding that the policy of marine insurance upon which this case was grounded contained an implied warranty of seaworthiness, which was breached.

If this Court wishes to pursue this subject further, the next group of cases may be of interest.

4. As between tug and tow the former is not an insurer but is required to use due care and skill in the selection of equipment and in the make up and management of the tow.

63 C. J., Sections 55, 58, 65, 69.

Note on Towage, 54 A. L. R. 108 et seq.

5. The use by the operator of a tug of a hawser furnished by the operator of its tow is not negligence in itself, but where the hawser is defective and the tug operator should have discovered the defect by inspecting it before use, he is negligent if he fails to do so.

The Quickstep, 9 Wal. 665, 670.

The Mary J. Kennedy (E. D. N. Y., 1925), 11 F. (2) 623, Aff'd C. C. A. 2, 11 F. (2) 625.

Robitzek & Bro. v. Davis (C. C. A. 2), 297 Fed. 107.

The Sunnyside (C. C. A. 2), 251 Fed. 271.

We can only guess that the Trial Court may have had in mind some of the authorities dealing with negligence as between tugs and tows. Therefore, we have cited the foregoing authorities in which the

operators of tugs borrowed hawsers from the operators of tows.

We do not claim that these cases are in point. They deal with torts as between tug and tow, not breaches of warranty as between assured and insurer. We can readily agree that it was Mr. Berg's duty to the owners of the dredge to examine the hawser very closely, considering where it came from, and that his failure to do so was negligent. Still, that does not change the fact that the operators of the dredge furnished the hawser, and the defects of the hawser constituted unseaworthiness of the dredge.

We do not know what authorities the appellees and the Trial Court could possibly rely on to support the idea that because Otto Berg, Jr., attempted the towage with a defective hawser furnished by the Corgans, the hawser thereby became a part of the equipment of the fishboat, and the implied warranty of seaworthiness of the dredge was fulfilled.

This reasoning makes it appear that Berg's decision to tow with the hawser nullified the Corgans' act of furnishing the hawser. The appellees, if they owned the dredge, were under a definite duty toward the appellant to furnish a sound hawser if they furnished any and this duty could not be modified or canceled by an act of Mr. Berg.

CONCLUSION

We submit that this case should be reversed on either of two grounds: 1—The appellees did not own the dredge and had no insurable interest therein; and 2—The dredge was unseaworthy at the commencement of the voyage and the warranty implied in the policy was thus breached.

Respectfully submitted,

MACCORMAC SNOW,
Attorney for Appellee.

APPENDIX A

O. C. L. A. 101-1119: “Avoidance of wagering or gaining (gaming) contracts.

(1) Every contract of marine insurance by way of gaining (gaming) or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract (a) where the assured has not an insurable interest as defined by this act, and the contract is entered into with no expectation of acquiring such an interest; or (b) where the policy is made ‘interest or no interest’, or ‘without further proof of interest than the policy itself’, or ‘without benefit of salvage to the insurer’, or subject to any other like term; provided, that where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.”

O. C. L. A. 101-1120: “(Insurable interest:) Insurance interest defined.

(1) Subject to the provisions of this act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.”

O. C. L. A. 101-1121: “When interest must attach.

(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected. . . .

(2) Where the assured has no interest at the time of the loss, he can not acquire interest by any act or election after he is aware of the loss.”

O. C. L. A. 101-1132: “(Disclosure and representations:)

Disclosure by assured; (Circumstance explained).

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

★ ★ ★

(5) The term ‘circumstance’ includes any communication made to, or information received by, the assured.”

O. C. L. A. 101-1133: “Disclosure by agent affecting (should read “effecting”—pocket part) insurance.

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer: (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him; and (b) every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."

O. C. L. A. 101-1134: "Representations pending negotiation of contract.

(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

O. C. L. A. 101-1139: "Voyage and Time Policies.

Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a 'voyage policy', and where the contract is to insure the subject-matter for a definite period of time the policy is called a 'time pol-

icy'. A contract for both voyage and time may be included in the same policy."

O. C. L. A. 101-1170: "(Application of Common Law and Law Merchant.)

The rules of the common law, including the law merchant, save and except where they are inconsistent with the express provisions of this act, shall continue to apply to contracts of marine insurance."

APPENDIX B

(Beginning with the third line on page 291 of "Transcript of Proceedings" on file with this court and ending with page 293 thereof.)

June 23, 1947

(Further proceedings had in the above-entitled cause as follows):

MR. SNOW: I hand to the Court an application to reopen this case to introduce expert testimony concerning the sufficiency of the hawser involved. My contention is that I believe that nearly any competent towboat man or marine surveyor would testify that this hawser was insufficient to conduct the towage of the dredge, and I think this evidence bears very closely on the last question which your Honor put, the question of the seaworthiness of the dredge.

THE COURT: Mr. Phillips, do you oppose the motion?

MR. PHILLIPS: Yes, your Honor. We do not believe that is material at all.

THE COURT: Do you want to stand on the legal proposition, then?

MR. PHILLIPS: Yes.

THE COURT: All right. I am rejecting your offer. I submit the record is very clear — what Mr. Phillips and I have just said.

MR. SNOW: I would like to have a clear record on that proposition.

THE COURT: Can I make it any more clear than I just have?

MR. SNOW: Mr. Phillips argued that because Otto Berg, Jr., the skipper of the fishing boat, accepted this hawser, that relieves——

THE COURT: You state the position again.

MR. PHILLIPS: My position is that there is no finding as to liability on the part of the

dredge for that hawser under the facts and evidence of this case; that the seaworthiness of the dredge was not based on the hawser in any way.

THE COURT: You mean, it did not include the hawser?

MR. PHILLIPS: No.

THE COURT: Because the hawser was part of the tug's equipment and not of the dredge. I agree with you as to the legal proposition and reject your offer, Mr. Snow, to reopen the case on that basis. That seems to me to make the record.

MR. SNOW: Yes.

THE COURT: In other words, if I heard the testimony you are offering I would deem it material.

MR. SNOW: Yes, I appreciate that.

THE COURT: It seems unnecessary to reopen the case and hear it.

MR. PHILLIPS: There is another thing I might say on the record, and that is I think the insurance company had waived that entirely—

THE COURT: I am holding with you on the first proposition.

MR. SNOW: I understand your Honor is not planning to reopen the case, not because of any lateness in the application?

THE COURT: Correct.

MR. SNOW: I thank the Court.

THE COURT: All right.

APPENDIX C

Implied Warranties Under English Law

Under the English law in a *voyage* policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. *Marine Insurance Act*, 1906, 6 Edw. 7, c. 41, Sec. 39 (1), 2 *Arnould* 1756, also Section 686, 1 *Arnould* 45, Sec. 30, 12th Ed.

Under English law in a *time* policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. *Marine Insurance Act*, 1906 *supra*, Section 39 (5), 2 *Arnould* 1757, also Section 697, 12th Ed. *Aetna Ins. Co. v. Sacramento Navigation Co.* (C. C. A. 9), 273 Fed. 55, 60.

The defective hawser was furnished by the operators of the dredge. It thus became a part of the dredge's equipment and was no part of that of the fishboat. It rendered the dredge unseaworthy. The loss was on a part of the policy covering a voyage. Under English law the policy would be voided. If the policy is considered a time policy, notwithstanding the voyage indorsement on which the claim is made the policy would still be voided under English law because the assureds were in privity with Cap-

tain Corgan and he with the hawser and the circumstances under which it was "borrowed". The loss is attributable to the defective hawser, because its many breaks lengthened the voyage until evening when the tide flooded and the wind and seas rose.

APPENDIX D**\$187.50 in Registry of District Court**

There is \$187.50 in the registry of the District Court in this case. No question concerning this money is raised by this appeal. However, the Court may desire to know something about it. Therefore, we set forth the following explanation.

The premium which the appellant charged to cover the towage of the dredge from Nehalem Bay to Tillamook Bay was \$1,200, of which \$1,062.50 was to be returned on safe arrival, or a net of \$187.50 (10, 11,232). This premium was paid by Coast Dredging & Construction, Ltd., by check signed on behalf of this Corgan partnership, by J. H. Corgan (240). On November 30, 1945, Mr. Knapp, on behalf of the appellant, in a letter to the appellees (233) pointed out the breach of the express warranty of towage by the Umpqua Chief, and mailed the check of Addison P. Knapp Co. for \$187.50 to the appellees. On December 13, 1945, Judge Loneragan returned this check to the Addison F. Knapp Co. (235).

On May 21, 1946, with the filing of the original answer (68) appellant paid this sum of \$187.50 into court (48).

On June 17, 1946, appellant took the Tillamook depositions of the members of the Steinbach family and learned the facts about the ownership of the

dredge, and about the hawser (Exhibit 7, p. 77).

The final judgment (53) makes no disposition of this sum of \$187.50 which is still in the registry of the District Court. The amount of the decree is determined by deducting from the insured value of the dredge, \$12,500, the sum to be returned out of the gross premium in the event of safe arrival, \$1,062.50, leaving a balance of \$11,437.50.

Under the facts, as developed at the trial, the District Court could make no disposition of this sum of \$187.50. The money never belonged to the appellees. It was paid by the Corgans and loaned to them for the purpose by the two Steinbach men, but none of these four parties is under the jurisdiction of this Court.

The Oregon statute does not include any section on the return of premiums. Under the English statute, Section 84 (1, 2 and 3) (2 *Arnould*, 1771) the premium could not be repaid to the appellees in any event because of the fact that their policy is a gaming or wagering policy, and because there was a strong element of deception by Mr. Steinbach and Captain Corgan which induced the appellant to issue the policy to the appellees. Under the Oregon statute, Section 101-1170, the question is to be determined by application of common law. We do not brief the question in detail because it is not raised by this appeal. The money is still in Court and still belongs to the appellant.

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

APPELLEES' BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

APPELLEES' BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION

Plaintiffs-Appellees are residents and inhabitants of the State of Oregon. Appellant-Defendant is a New Jersey corporation. The action involves a claim on a marine insurance policy amounting to \$11,437.50, with interest. See Supplemental Complaint (Transcript p. 5). Judgment in that amount plus \$1500.00 as attorneys' fees and costs was rendered on June 23, 1947, by Claude McColloch, District Judge (Transcript p. 53). The District Court had jurisdiction under U.S.C.A. Title 28, Sec.

41 (1). The Circuit Court of Appeals has jurisdiction under U.S.C.A. Title 28, Sec. 225.

FIRST SPECIFICATION OF ERROR

Under this specification of error the Appellant (page 7, Appellant's Brief) states that the District Court erred in holding that the Appellees were the proper parties to sue on the insurance policy, and permitting them to recover because:

1. They were never the owners of the dredge.
2. They had no insurable interest in it.
3. The dredge was not transferred to them.
4. They were not the real parties in interest.
5. Policy was void for want of insurable interest in them.

At this time we wish to call to this Court's attention the circumstance that although counsel for the Appellant makes a statement (page 6, Appellant's Brief), "This appeal confines itself to the two issues about which there was no contradictory testimony, namely, lack of ownership and insurable interest by and in the Appellees and unseaworthiness of the dredge for the towage by reason of the defective hawser," nevertheless, a great portion of the Appellant's Brief concerns itself with a discussion of the alleged false representations and/or violation of warranty by Appellees. These observations appear specifically on pages 11, 18, 19, 20, 22, 23, 39, 40, 41, 51, 53, 54 and 55 of the Appellant's Brief. We do not see how anyone, including counsel for Appellant, in view of his

statement on page 6 of Appellant's Brief, can seriously contend that there were any false representations by the Appellees at any time, or that any warranty of theirs was breached. But since this element has been injected into the argument we find it necessary to answer the same.

The Trial Court found (IX, Tr. 49), "That it has not been established that the plaintiffs or their agents failed to disclose any material facts to the defendant, in violation of the terms of the said insurance policy, or that in obtaining the said extension and amendment of the said policy permitting the said voyage from Nehalem Bay to Tillamook Bay, the plaintiffs or their agents made any false representations or violated any warranty to this defendant."

PLEADINGS AND FINDINGS

Under the heading, "pleadings and findings", (Apt's. Br. 7) the statement is made that "the only kind of insurable interest in the dredge which Appellees have pleaded is ownership". It is true that the complaint alleges (Tr. 2), "That during the times herein mentioned the plaintiffs were the owners of a suction dredge named 'Wishram' ". This allegation was denied in the amended answer (Tr. 18). The Trial Court found "That the plaintiffs are and were at all times herein mentioned proper parties to insure a certain suction dredge 'Wishram' ". The Appellant contends that this constitutes a variance. In this we do not agree, and will discuss this phase of the case at page 28 in this Brief.

STATEMENT OF FACTS

Under this title Appellant undertakes to discuss ownership of the dredge and the insurable interest therein. At the outset, please permit us to remark that we do not regard the language therein a statement of facts, but on the other hand such portion of Appellant's Brief (pp. 8 to 27 inc.) constitutes pure argument and will be accepted as such. It is true that in June, 1946, the dredge "Wishram", built and owned by the Government, was for sale by the War Department Army Engineers, at Coos Bay, Oregon. One Hugh Corgan, an experienced dredge man and an acquaintance of the Steinbachs for about 30 years, arranged with the Army Engineers at Portland, Oregon, for the purchase of the dredge for the benefit of the Steinbachs (Tr. 119-121). There was discussion and negotiation concerning forming a dredging company composed of three individuals, namely, David E. Steinbach, John L. Steinbach and Hugh Corgan (Tr. 105). However, such negotiations were never completed, and we believe the discussion thereof will be of no assistance to this Court. We believe it is sufficient to say that on June 6, 1945, the Army Engineers wrote a letter (Exhibit 22, Tr. 229) to Hugh Corgan. However, far from constituting a "document of title" as contended by the Appellant (Apt's. Br. 10), this letter was in fact merely a receipt for \$5,500.00, with authority to the addressee, Corgan, or his representative, to obtain delivery of the dredge at North Bend, Oregon, on Coos Bay. Title could not and did not pass until delivery of the property by the Army Engineers. Hugh Corgan did

obtain delivery of the dredge. He neither took nor retained title to the same at any time (Tr. 119-120). Quite consistently therefore, Capt. Corgan never executed any title instrument to the dredge to the Appellees or anyone else as stated (in Appellant's Br. p. 11, Tr. 99). Hugh Corgan has at all times disclaimed interest in the dredge. The statement (in Apt's. Br. 11) "there is no evidence of any such disclaimer prior to the trial" is incorrect. Such a statement was in fact made by Mr. Corgan when his deposition was taken on May 29, 1946, over a year prior to the date of trial. Furthermore, Addison P. Knapp, a witness for the Defendant-Appellant stated, "Q. Did Capt. Corgan claim to be the owner of it when the insurance policy was issued? A. No. he did not." (Tr. 204).

We come now to the first of a series of imputations of misrepresentation indulged in by counsel for the Appellant, previously referred to in this brief. Statement is made (Apt's. Br. 11) "that John L. Steinbach and David E. Steinbach, doing business as Steinbach Iron Works, furnished the money with which Capt. Corgan bought the dredge, and the money with which he insured it in the names of Appellees *under the pretense that it belonged to them.*" The fact is and the evidence shows that Frances M. Steinbach furnished \$1675.00 (Tr. 222) of the money required to purchase the dredge namely, \$5,500.00. In addition to this on June 25, 1945, she executed a personal check to Addison P. Knapp Company (agent for the Universal Insurance Company, Appellant) in the amount of \$1,250.00 (Tr. 239). This

premium of \$1,250.00 covered the risk under the policy for the towage of the dredge from Coos Bay to Nehalem Bay. In the event of no loss, \$1062.50 was to be returned to the assureds. There being no claim, premium was \$187.50 (Tr. 214). After the receipt of the premium the Appellant returned to the Appellees the sum of \$1062.50 by issuing to them its check for \$415.74 and applying the balance, namely \$646.76 against the cost of the layup premium at Coos Bay and the operating premium at Nehalem Bay (Exhibits 24 A and B). The charge of \$187.50, representing the premium cost in the event of no claim, was likewise retained.

In October, 1945, it became desirable to tow the dredge from Nehalem Bay to Tillamook Bay. A similar premium, namely, \$1250, was agreed upon by the parties, and on October 24, 1945, an endorsement was added to the policy (Exhibit 26C, Tr. 232). It will be observed that the endorsement provided for the towing to be made by the tug "Umpqua Chief". However, the assureds disclaimed any notice of this requirement or any knowledge of the endorsement which specified the "Umpqua Chief" as the tow until after the towing had taken place and a loss incurred as set out in the complaint (Tr. 2). The towing, in fact, was done by the boat "Julia D" and not the "Umpqua Chief". Any effect of this substitution was expressly waived in this Appeal (Apt's. Br. 6). A charge for the premium for the risk of towing the dredge "Wishram" from Nehalem Bay to Tillamook Bay was rendered to the Appellees in October, 1945. On this occasion only the amount of \$187.50 (premium in the event of no claim) was paid

to the Addison P. Knapp Company by a check of the Coast Dredging and Construction, Ltd. bearing the signature of J. H. Corgan, a son of Capt. Hugh Corgan (Tr. 240). This check is dated October 30, 1945, and was endorsed by Addison P. Knapp Co. on November 8, 1945. The dredge became a total loss on November 1, 1945 (Exhibit 39, Tr. 242). Thereafter on November 30, 1945, Addison P. Knapp Company by a letter of that date attempted to return the sum of \$187.50 to the Appellees (Tr. 233).

The Brief of the Appellant devotes considerable space to a discussion of the Steinbach family arrangement, and affairs of the Steinbach Iron Works, commencing at page 12. Counsel seems to reason that because the Steinbach Iron Works carried on its ledger the amounts advanced by Frances M. Steinbach for the purchase of the dredge, that this circumstance prevented the Steinbach women (the Appellees herein) from having an insurable interest in the dredge purchased from the Army Engineers. None of the principals involved in this litigation ever contended that Frances M. Steinbach and Carolyn S. Steinbach did not own the dredge until such suggestion was made by counsel for the Appellant (Tr. 199). John M. Steinbach testified that the dredge had been bought for the benefit of the Steinbach wives (Tr. 88). David E. Steinbach testified that the two ladies were the owners (Tr. 112-113). Capt. Hugh Corgan testified that he purchased the dredge as agent for the Steinbachs, and had no further interest in it (Tr. 119-120). The Appellant throughout its brief contends that

Capt. Corgan was the owner of the dredge in spite of all the verbal evidence on that point to the contrary. It interprets a letter from the Army Engineers, dated June 6, 1945, (Plaintiff's Exhibit 22, Tr. 229), as being a title conveying instrument. This letter should be read in connection with the previous one of May 25, 1945, from the same source (Plaintiff's Exhibit 21, Tr. 228). The letter of June 6, 1945, was never intended to transfer title and is not regarded as a title transferring instrument by anyone with the possible exception of counsel for the Appellant. The language is significant; "upon *presentation* of a copy of this letter to the Resident Engineer, United States Engineers Office, Empire, Oregon, he will deliver to you or your authorized representative the property comprising the sale". If the letter transferred title, why was it necessary to present the same for delivery of the merchandise? Furthermore, the Army Engineers understood that someone other than Capt. Corgan might take delivery. In addition, as testified by Capt. Corgan (Tr. 120) the Government does not give a deed to such property so purchased. That it was possible, and in fact, extremely common usage for persons to take title to personal property without a bill of sale or other writing will be demonstrated at a later place in this Brief (see page 39 *infra*). Since the law and common usage (including that of the United States Government itself) permits transfer of personal property by oral grant, the charges of misrepresentation by counsel for the Appellant come with poor grace. The statement "it was a direct misrepresentation of the fact that

Capt. Corgan was interested, and that he held the legal title to the dredge" (Apt's. Br. 19) is pure sophistry. Capt. Corgan did not hold legal title to the dredge at any time. We agree that Capt. Corgan never testified that he or Mr. Steinbach told Mr. Knapp anything contrary to Mr. Steinbach's statement that the ladies owned the dredge and that the policy was to be issued to them. As a matter of fact, the ladies were still contending that they were the owners of the dredge when they filed their complaint in the District Court on March 30, 1946. It would be a curious type of misrepresentation, indeed, when the same claim was in effect repeated when the complaint was filed:

The manner in which ownership of the dredge was actually acquired by the Appellees was described by John L. Steinbach (Tr. 84):

"Q. Who contributed the money that went to pay for the Wishram?

A. My brother and I, I believe in the neighborhood of \$3800, and then we borrowed \$3825. I believe that was the amount—and we borrowed from my wife \$1675 and that would make \$5500.

Q. Your wife is the plaintiff Frances Steinbach?

A. That is right.

Q. What was done with that money.

A. My wife and I came into Portland together and we purchased a certified check or draft and Mr. Corgan and I went up to the Army Engineers office together, and Mr. Corgan handed them the check and the letter from the Army Engineers accepting the check to Captain Corgan was handed to him and he turned right around and handed it to me.

Q. I am handing you Plaintiff's Exhibit No. 22.

Is that the letter which you say the Army Engineers gave to Captain Corgan?

A. It is.

Q. Had Captain Corgan or anyone else, except the Steinbachs, contributed anything to the purchase price of the Dredge?

A. No.

Q. Prior to the purchase of the dredge, or at the time of the purchase of the dredge, was there any discussion between the Steinbachs as to who was to hold title to the dredge Wishram?

A. There was.

Q. Go ahead and give it.

Mr. Snow: At this point, your Honor, I desire to enter an objection to any and all testimony which might tend to prove parol title to this dredge, on the ground that the Oregon statute provides, and on the further ground that from time immemorial the transfer of boats and vessel have been and are made by bills of sale."

That the Oregon statute did not apply to the transaction between the Army Engineers and the Steinbachs, and that counsel misunderstood its effect, will be demonstrated at a later point in this Brief (see page 13). Still insisting, however, that title to the dredge could be acquired only by a bill of sale, the statement is made (Apt's. Br. 22): "when Mr. Steinbach and Capt. Corgan told Mr. Knapp to issue the policy to the two ladies they withheld from him some very important information" followed with the enumeration of four supposed items in that category. We will point out, first, that the Insurance Company was advised to issue the policy in the names of the two Steinbach women by Mr. Steinbach and not by Capt. Corgan, Tr. 197). The items of

“very important information” claimed to have been withheld from Mr. Knapp (as agent for the Appellant) were:

1. That he was not shown the letter by which the Engineers transferred the dredge to Capt. Corgan. In this connection we contend that Capt. Corgan did not obtain the dredge by such letter, or at all (see Plaintiff's Exhibits 21 and 22, Tr. 228-229). Since no one (except counsel for Appellant) has ever regarded Plaintiff's Exhibit 22 as an instrument conveying title, it consequently could not have been regarded as “very important information”. We pause to inquire, in view of the objection interposed to parol evidence of the transfer of the dredge (Tr. 85) page 10 this Brief, that the only method of transfer of a vessel was by bill of sale, whether counsel for Appellant believes any title to anyone was ever transferred by the Army Engineers. Since the letter of June 6, 1945 (Plaintiff's Exhibit 22) is obviously not a bill of sale, by what means did Capt. Corgan acquire title as counsel contends?

2. The fact that the Insurance Company was not advised that the Steinbach Iron Works had furnished money for the purchase of the dredge would not have effected the placing of insurance. This circumstance is best demonstrated by the language on page 22 Appellant's Brief, immediately preceding the charge of withholding, wherein it is stated, “Mr. Knapp said (198): No, I would have told them that the proper way to insure the dredge would be in the name of whoever might hold title to it”. In other words, the Insurance Com-

pany did not care who furnished the money for the purchase of the dredge as long as the party that owned it appeared as the assured.

3. The Insurance Company was not told the reason for insuring the dredge in the name of the ladies was to keep the money away from the creditors of the Steinbach Iron Works. By the same argument, we contend that any reason causing the dredge to be in the names of the ladies was unimportant. The conduct of the affairs of the Steinbach Iron Works, and the internal affairs of the two Steinbach families were of no concern to the Universal Insurance Company or Mr. Addison P. Knapp. Parenthetically, we ask what money counsel is referring to at this time. We believe it is safe to say that when the insurance was placed two contingencies existed: there would be a loss, or there would be none. Certainly there was no expectation of a total loss of the dredge so that insurance money would come to the Steinbach women and not the creditors of the Steinbach Iron Works. If such were the expectation, it is safe to say that the contract of insurance would never have been written. What counsel overlooks is that the Steinbach family was putting *title to the dredge*, and any value thereof, in the names of the two Steinbach women, and not the proceeds of any insurance policy.

4. Agent for the Insurance Company was not told that a Corporation to own the dredge was contemplated. Since this was a matter of futurity, an event which never did take place, and could never have affected the placing of insurance in any fashion, we fail to see how

it was "very important information". It certainly was not so regarded by the parties at the time, particularly Capt. Corgan (Tr. 137). Further, in the event of the organization of the corporation and transfer of title of the dredge to it, the policy provided for such contingency. We dare say that it is not unusual for insured property to be sold or conveyed.

Mr. Knapp was never misled by any representations of Capt. Corgan or John L. Steinbach, in spite of the charges now appearing in the Brief of the Appellant. He was satisfied that insurance had been properly placed in the names of the proper parties. This is best demonstrated by a statement on the witness stand that the report of Emmett Rathbun, Surveyor, showed that one J. H. Corgan (son of Capt. Corgan) was the owner of the dredge (Tr. 205-206). He did not pay any attention to this statement (which statement, of course, was incorrect). Appellant states (Apt's. Br. 24), "there was no occasion for Mr. Knapp to be concerned by Mr. Rathbun's statement that J. H. Corgan owned the dredge".

The summary of Appellant's so-called "statement of fact" is no more correct than "the facts" upon which it is based (Apt's. Br. 26).

1. Hugh Corgan never owned the dredge.

"I purchased her as agent for the Steinbachs."
(Tr. 119)

2. The Steinbachs did not loan money on open ac-

count to the Corgans to own and operate the dredge.

“My wife and I came into Portland together and we purchased a certified check or draft and Mr. Corgan and I went up to the Army Engineers office together, and Mr. Corgan handed them the check and the letter from the Army Engineers accepting the check to Capt. Corgan was handed to him and he turned right around and handed it to me.” (Tr. 84)

The final language “statement of facts” (Apt’s. Br. 26-27) is interesting. Herein counsel for Appellant contends that the delineation of the business arrangement in the Steinbach family was made to elicit the sympathy of the Trial Court. He objects because the Steinbach men treated their wives fairly. We do not believe that the Trial Court was mislead by any considerations of sympathy. We prefer to believe that the Trial Court was impressed with the fairness of the arrangement. We do not believe that John L. Steinbach spoke an untruth in saying, “well, what’s mine is hers (Tr. 99). We do not desire this Court to be mislead by such or similar expressions. On the other hand, we believe the Court is entitled to consider them together with all other circumstances surrounding the purchase of the dredge and the issuance of the policy of insurance.

POINTS, AUTHORITIES AND ARGUMENTS

For convenience of this Court we will discuss in the order in which they appear in the Appellant’s Brief, the points and authorities therein set out.

1. The dredge "Wishram" was not a vessel.

Bartlett vs. Steam Dredge No. 14, 107 Mich. 74,
64 N.W. 951, 61 A.S.R. 314.

United States vs. Dunbar, 67 Fed. 783, 14 C.C.A.
639.

Fredericks vs. James Rees & Sons Co., 135 Fed.
730, 68 C.C.A. 368.

Yarnberg vs. Watson, 13 Ore. 11, 4 Pac. 296,
48 Am. Jur., "Shipping," Sec. 36.

O.C.L.A. § 2-907.

Counsel for Appellant contends that the dredge is a vessel, for the very obvious purpose of applying to it the provisions of the Oregon statute of frauds, O.C.L.A. Sec. 2-907. There is no evidence that the dredge was a vessel within the common accepted definition of that term. In fact the only evidence in the case is to the contrary. We refer this Court to the letter of the Army Engineers of May 25, 1945, (Exhibit 21, Tr. 228) where the dredge is denominated a "plant". In the decision of the Ninth Circuit Court of Appeals cited by Appellant (Apt's. Br. 28) the City of Los Angeles vs. United States Dredge Co., 14 Fed. 2nd 365, the Court had under consideration the question of whether a dredge was subject to a Federal law requiring inspection, or amenable to a municipal ordinance requiring the inspection of boilers. The Court held that the dredge came within the term vessel as defined by Sec. 3, Revised Statutes, (9 Fed. Stat. 2nd Ed. 391, Compt. Sec. 3). No Federal statute is involved in this case, nor any definition of vessel under a Federal statute. It is true that the word "vessel" is used at various places in the contract of insurance executed by the

Appellant. However, the laws of the State of Oregon providing for the manner of insuring marine risks, uniformly use the term "ship" instead of "vessel" (see Appendix A, Apt's. Br. 73). While this circumstance may be relatively unimportant, it indicates that there was no particular significance to be attached to the use of the word vessel in the policy. As a matter of fact the word "plant" (which the dredge was) would have been a preferable term to have been employed.

In *Bartlett vs. Steam Dredge*, supra, it was held that a steam dredge was not subject to a labor lien as a water craft where the term water craft was defined by State law to be "used or intended to be used for navigating the waters of this State." The Court said:

"As described by the defendants, 'the dredge hull is virtually a large scow, with a boiler, engine, and different kinds of machinery, a crane, or boom, and a dipper. It has no means of propulsion, except by towing, nor any rudder. The dredge is used for digging material under water, and is not used for transportation. It is the same thing as a steam shovel on land. It has no master, and is not used for transporting passengers, freight, or anything.'

"The sole purpose of these dredges was to dig, not to navigate. They are not moved from place to place for the purpose of navigation, as are vessels engaged in commerce, nor are they intended to be used for transporting passengers or freight, or the material which they bring up from the lake or river beds."

In *United States vs. Dunbar*, supra, it is stated:

"The question for decision in this case is as to

whether the dredge boat *Tipperary Boy*, exported to Canada in 1883, and imported in 1890, is entitled to entry without duty, as a manufacture of the United States, 'returned in the same condition as exported' 22 Stat. 517; Rev. St. U. S. Sec. 2505. This dredge boat was properly regarded as a manufacture or machine and not as a vessel, inasmuch as it had no power, of propelling itself, and is incapable of use save as a dredging machine."

In *Fredericks vs. James Rees & Sons Co.*, supra, it is held that a Pennsylvania law which gave a lien for repairs on "all ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio in this state" embraced only such vessels as are engaged in the business of commerce or trade on such river, and did not apply to adredge boat without motive power and used only for dredging apparatus. The Court said:

"The ships, steamboats, or vessels referred to, are clearly those intended for the purpose of or actually engaged in the business of navigating the named rivers; that is, in the business of moving on the waters thereof from place to place, whether for the purpose of carrying persons or commodities, or both. This obvious meaning of the words used in the act, excludes a dredge boat, neither intended nor used for the business of moving persons or commodities from place to place on the waters of said rivers. Whatever extension of meaning may be given the words 'ship, steamboat or vessel,' used alone, the word 'navigating' imports a clearly defined limitation which cannot be disregarded, and dredge boats, floating pile drivers, and floating elevators are excluded from the purview of the act, though scows and barges, intended to be towed from place to place for the carriage of passengers or commodities, would be included."

Finally, the term "vessel" has been legally defined in Oregon, *Yarnberg vs. Watson*, supra, as a "structure made to float upon the water for the purpose of commerce or war, whether impelled by wind, steam or oars." This case is the only one apparently ever decided in which the provisions of O.C.L.A. § 2-907 have been analyzed and applied. The question therein involved was whether an uncompleted hull was a vessel so that its sale was required to be in writing. A lower court decision holding that such hull was a vessel was reversed on appeal. Justice Lord said:

"The only question argued and presented by this record is whether the boat or property transferred at the date of the oral agreement and transfer was a vessel, within the meaning of section 773, Or. Code, which provides that 'a sale or transfer of a vessel is not valid unless it be in writing, and signed by the party making the transfer.' It is conceded that if the work alleged to have been done by the plaintiff was upon his own, and not upon the defendant's property, he would not be entitled to recover. But the defendant contends that the provision of the law above cited only applies to a vessel, and not to some incomplete portion thereof, as a hull or other part, requiring construction of additional parts before it can properly be denominated or become a vessel, and consequently it was error in the court to assume in its charge that the facts as disclosed by the record brought the record within the meaning of this provision of the law by directing the jury that they must find that there was a writing, otherwise there could have been no sale, and thereby fixing the defendant's liability.

"It will not be questioned if, upon the facts, the property was sold and delivered, and, at the time of

such sale and transfer, it was not a vessel, that any writing was required to make such a transaction valid, or make proper proof of that fact. The term 'vessel', in its broadest sense, includes a variety of things obviously not intended to be included in the provision of this law. Webst. Dict. 'Vessel.' *Knisely v. Parker*, 34 Ill. 484. It has been defined to be any 'structure made to float upon the water for the purpose of commerce or war whether impelled by wind, steam, or oars.' Webst. Dict. 'Vessel.' *Chaffe v. Ludeling*, 27 La. Ann. 611."

It will be noted that Justice Lord held two things necessary to constitute a vessel. First, it is a floating structure for the purpose of commerce or war; and second, it shall have a means of propulsion. The dredge "Wishram" possessed neither of these characteristics.

(a) The Defense of Statute of Frauds is not Available to the Appellant.

49 Am. Jur. "Statute of Frauds," Sec. 589, Sec. 598.

Ringler vs. Ruby, 117 Ore. 455, 244 Pac. 509, 46 A.L.R. 245.

Roberts vs. American Alliance Insurance Co., 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310.

In *Ringler vs. Ruby*, *supra*, the Supreme Court of Oregon, said:

"At the very threshold of the case plaintiff is met with the objection that the alleged contract, by reason of the statute of frauds is void. Defendant, however, is not in position to urge this point. He is not a party to the contract. It does not rest with him to say that the parties thereto will not abide by the same regardless of the statute. There is nothing inherently wrong, nor is it illegal, for an owner of real

property orally to make such an agreement. The statute of frauds was enacted for the protection of the party sought to be charged. It is personal and not available to strangers to the agreement. (Citing authorities)."

In *Roberts vs. American Alliance Insurance Co.*, supra, it was held that the rule that a stranger to an oral contract cannot take advantage of the fact that the contract is not in writing as required by the statute of fraud precludes an insurance company, which has issued to a vendee of a piece of property a policy of insurance upon such property, from asserting the invalidity of the oral contract as a defense to liability under the policy; the Court said:

"(The plaintiff's) title to the part allotted to him in partition is good as against his brother, unless the statute of frauds be invoked or relied upon as a defense, and a stranger to the transaction, such as the defendant, can take no advantage of the statute (*Cowell v. Ins. Co.*, 126 N.C. 684, 36 S.E. 184; 26 C.J. 173). Hence, in the present action, as against the defendant, it is proper to say that he is the sole and unconditional owner thereof."

2. The policy insured on was not void for lack of insurable interest.

O.C.L.A. Sec. 101-1120.

Bird vs. Central Manufacturers Mutual Ins. Co.
120 Pac. 2d 753, 168 Ore. 1.

Commercial Securities Co. vs. Hall, 140 Ore. 644,
15 Pac. 2d 483.

Under this heading counsel for the Appellant, proceeds under the premise that the Appellees had no legal or equitable relation to the dredge, consequently had no interest to insure. The conclusion would be true if the major premise were correct, which it is not. Counsel cited, but did not discuss, O.C.L.A. Sec. 101-1119 and 101-1120. These two sections are, however, set out on page 73 of Appellant's Brief. We think no discussion is necessary to demonstrate to this Court that the insurance policy executed by the Appellant was not a wager or gaming contract as defined by Sec. 101-1119. However, insurable interest as defined in Sec. 101-1120 has become an issue in these proceedings. To paraphrase the section defining insurable interest: a person has an insurable interest who is interested in a marine adventure, and to be interested in a marine adventure in turn means a person may benefit by the safety or due arrival of the insured property or may be prejudiced by its loss, damage or detention or "may incur liability in respect thereof." This language, particularly the last clause, is quite inclusive and fully capable of covering the interest which the evidence shows the Appellees possessed at the time the policy was issued. It is stated in *Bird vs. Central Manufacturers Mutual Insurance Co.*, supra, "It is well settled that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. It is sufficient to constitute an insurable interest in property that the insured is so situated with reference to the property that he would be liable to loss should it be injured or destroyed by the peril against which it is insured."

We think the following statement of John L. Steinbach, succinctly summarizes the effect of the family arrangement:

“Q. (By Mr. Snow:) She is not going to be prejudiced by the loss of the dredge, is she?

A. Well, I think she will be.

Q. But she will get her \$1650. back.

A. She will get her \$1650. back, but we hold our property in common. If I make a loss she loses, too” (Tr. 98).

Another definition of insurable interest appears in *Commercial Securities Co. vs. Hall*, supra, where the Supreme Court said:

“In arriving at the meaning of an ‘insurable interest,’ the following excerpt from 4 Words and Phrases, Third Series, p. 346, will be helpful: ‘Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself.’

“As to what constitutes an insurable interest generally, we direct attention to the following from Cyclopedia of Automobile Law, Huddy (9th Ed.) 13, 14, p. 57: ‘Whoever may fairly be said to have a reasonable expectation of deriving a pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest.’ ”

3. In Oregon ownership of personal property may be alleged by simply stating that the plaintiff is owner.

Columbia Hotel Co. vs. Rosenberg, 122 Ore. 675,
260 Pac. 235.

The English case *Cousins vs. Nantes*, 128 Reprint 203, cited by the Appellant (Apt's. Br. 34) does not state the law in Oregon. The reference to *Christman vs. State Insurance Co.*, 16 Ore. 283, and quoted from in Appellant's Brief has been misinterpreted. In this case (which was an action for loss occurring under a fire insurance policy) one Stansbury, the plaintiff, sued in his own name. His complaint did not allege that he had any interest in the property burned or what that interest was. The Court quite properly held the complaint defective. In the instant proceedings the Appellees alleged their interest, namely, ownership (Tr. 2).

In *Columbia Hotel Co. vs. Rosenberg*, *supra*, which was an action on a promissory note executed by the defendant in favor of one Higgins, the plaintiff alleged that it was the owner and holder of the note, but there was no allegation of an assignment from Higgins to it. The complaint was held sufficient, the Supreme Court stated:

"It is argued that Exhibit A shows on its face that the note is payable to Higgins, 'Treasurer, Astoria New Hotel Building Fund,' and that plaintiff is not connected therewith. Defendant inferentially concedes that, if the allegation that plaintiff is now the owner and holder of said agreement and note is an averment of fact, the complaint is sufficient. Defendant contends that such allegation is a mere conclusion of law. Under the simple system of pleading obtaining in this state that allegation states the ultimate fact. It is much more than a mere legal conclusion. Or. L. Sec. 67; Phillips, Code Pleading, Sec. 325; 1 Sutherland, Code Pleading and Practice,

p. 83, Sec. 98. See, in this connection, *Bade v. Hibberd*, 50 Ore. 501, 93 P. 364."

There was no variance between the pleading and the proof in the instant case.

4. The burden of proof of ownership is fully sustained by the evidence.

O.C.L.A. Sec. 101-1121.

Under this point counsel for Appellant states that the Appellees had the burden of proving the same insurable interest alleged in the complaint, namely, ownership, citing four decisions. In *Bell vs. Ansley*, 16 East 141 (Apt's. Br. 36), the only case discussed by counsel under this heading, the plaintiff alleged that he was the sole owner of certain goods insured. Since the policy sued on disclaimed joint ownership and the evidence supported joint ownership, the Court properly held that a variance existed. What may have been said by the Supreme Court in *Oatman vs. Bankers etc. Assn.* 66 Ore. 388, 133 Pac. 1183, 134 Pac. 1033, cannot be authority on the question presented in the present appeal because in the *Oatman* case the policy involved was a standard fire insurance policy, the terms of which by Oregon law required the interest of the assured to be sole ownership. O.C.L.A. Sec. 101-1801. For failure to comply with this provision the policy was held to be void. The policy sued on in the present proceedings is not a fire policy but was a policy of marine insurance. Consequently, whatever may be

said with reference to the requisite of sole ownership in a fire policy is rendered in complete variance with the provision of Sec. 101-1121, which provides that an assured "need not be interested when the insurance is effected." We do not claim, of course, that the Appellees did not have an insurable interest when the policy was executed by the Appellant. We merely point out the dissimilarity of treatment of insurable interest in the two types of policies. On the question of ownership the witnesses testified as follows:

John L. Steinbach

"I told Mr. Knapp that this dredge had been bought for the benefit of the Steinbach wives, and to make the insurance out to Carolyn and Frances Steinbach" (Tr. 88).

"Q. As far as you know, did the ladies, that is, your wife and the wife of Dave, and yourself, ever transfer that boat at any time after that up to the time of the loss?

A. No."

"Q. Do you claim any interest in that dredge, now, adverse to your wife?

A. No" (Tr. 91).

"Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?

A. That is right" (Tr. 103).

Frances M. Steinbach

"A. We met at Dave Steinbach's house, John, my husband John, Dave and Carolyn, and we planned on buying this dredge, the Wishram. We talked it over for quite a while and then we decided that

Carolyn and myself should have the Wishram, and it was done for convenience.

The shop had been in the names of John and Dave for years, and we never had had a real good living out of the shop and, so, we thought maybe we could get into something else—if we could get into something else we would have a little bit, maybe we could make a little bit more money than we had in the shop. Not only that, but Dave Steinbach had two boys in the service. * * *

A. We had a boy in the service, too, and we thought we could put this in our names, in the women's names, and then, after it got into working order of some sort, then we would probably turn it over to the boys, or some other affair, but it was not done—it was not to be done until after everything was paid off and was in working order" (Tr. 176-177).

David E. Steinbach

"A. At the time of the purchase of the dredge, my brother, his wife and my wife, we met at our house and talked about what we were going to do when we purchased this dredge here to keep it out of the shop. On account of the financial difficulties there that we had with the Maritime Commission, we did not want to get it mixed up with the shop account, so we had put the insurance in the ladies' names to keep it away from the Iron Works. * * *

Q. Then what did you agree to do about the ownership of the dredge?

A. Well, we agreed to put it in the ladies' names.

Q. Has that agreement ever been changed in any way?

A. No, it never has" (Tr. 112-113).

Hugh Corgan

"A. Then I bought the dredge in—bid the dredge in with the Steinbachs' money and immediately handed over the letter that the Government gave—

the Government does not give a deed to any of that property when you bid. They simply give you so many days to get the property away from the mooring, or wherever it is located.

Q. When you got the letter from the Engineers, the letter which we have marked here as Plaintiffs' Exhibit No. 22, acknowledging receipt of the purchase price of the dredge and telling you to come and get it—in other words, that is the substance of the letter. Where did you get that letter?

A. I got it from the Engineers. * * *

Q. When the insurance policy was finally agreed upon, do you remember who was present?

A. Yes.

Q. Who?

A. John Steinbach and myself.

Q. Was there any discussion at that time? Was there any discussion between John Steinbach and—Who was representing the insurance company?

A. Mr. Knapp.

Q. Mr. Knapp?

A. Yes.

Q. Was there any discussion at that time as to how much insurance should be issued and in whose names?

A. Well, John said the Steinbach women, Mrs. Dave Steinbach and his wife, Frances.

Q. You did not claim to own any interest in it then, did you?

A. No.

Q. And don't now?

A. No." (Tr. 120, 121, 122 and 123).

We do not overlook the ledger pages of the Steinbach Iron Works (Exhibit 7 (4) Tr. 222-223) which show various sums totaling \$2925.00 to have been "borrowed from Frankie" nor a promissory note payable to her in that amount, dated June 25, 1945 (Exhibit 7 (11) Tr. 223). These constitute bookkeeping entries for the con-

venience of the parties concerned, and do not militate against the fact, as the evidence shows elsewhere, that the Appellees owned the dredge.

5. Under the allegation of ownership, evidence of any ownership capable of being insured may be received.

Hough vs. City Fire Insurance Co., 29 Conn. 10,
76 A.D. 581.

Tracy vs. Juanto, 103 Ore. 416, 205 Pac. 823.

In *Curacao Trading Co. vs. Federal Insurance Co.*, 50 Federal Supp. 441, discussed at page 37, Appellant's Brief, there was no insurable interest in the plaintiff either as owner or in any other manner. The Court properly denied recovery. In both *Vancouver National Bank vs. Law Union & Crown Insurance Co.* 153 Fed. 440, 453 and *Finlon vs. National Union Fire Insurance Co.* 65 Or. 493, discussed at page 38 Appellant's Brief, the policies involved were standard fire insurance policies. As above pointed out (page 24 this Brief) the standard fire insurance policy contains the express provision that it shall be void "if the interest of the insured be other than unconditional and sole ownership." The policy of marine insurance involved in the present proceedings contains no such provision. But even in the case of fire insurance policies the expression "sole ownership" has been interpreted liberally and at variance with the conclusion counsel for Appellant has reached. For example, in the case of *Hough vs. City Fire Insurance Co.*,

supra, the policy sued on contained a provision that if the interest in the property was not absolute it should be so represented to the Company, otherwise the insurance would be void. It appeared at the trial that the insured had an equitable title only. Absolute interest was defined by the Court as one so completely vested in the individual that he could not be deprived of it without his consent. The Court saying:

“The Court instructed the jury that a perfect legal title was not essential to plaintiff’s right of recovery; that he might be regarded as the real owner if he had the equitable title, and if his interest was such that the loss by fire would fall on him; that in such case the property was his, within the fair import of the application in which it was described as his; but that he could not recover, if, in the opinion of the jury, he had been guilty of any fraud, misrepresentation or concealment in regard to the state of this title; that the evidence of the plaintiff’s statement regarding his title, made to Houghton, was admissible; * * * that if plaintiff had truly and fairly represented to the company the nature of his interest and title to the property insured, he was not precluded from a recovery by reason of the failure to specify particularly in the policy the nature of that title, nor by reason of the failure to make such representation in writing.”

In *Tracy vs. Juanto*, supra, the Supreme Court of Oregon, stated:

“In addition to other evidence which was offered by the plaintiff to establish the ownership of the sheep, the plaintiff, over the objection of the defendant, was permitted to testify to a declaration, made in the absence of the defendant by the herder of the sheep while the same were in his possession and un-

der his control and upon lands claimed by the plaintiff, that the defendant was the owner of the sheep. The admissibility of this testimony is the only question necessary for decision, as it is the only one discussed in appellant's brief. That declarations of this nature are admissible and competent as evidence tending to show ownership has been twice decided by this court in similar cases, and therefore this is no longer an open question in this state. *Jones Land & Livestock Co. vs. Seawell*, 90 Or. 239, 176 Pac. 186, and *Keller vs. Johnson*, 99 Or. 113, 194 Pac. 185."

Under the rule of this decision and the authorities upon which it is based, the testimony of Capt. Corgan, who is claimed by the Appellant to be the owner and in possession of the dredge, is extremely relevant because he denied any claim or interest in the dredge whatsoever.

6. There was no misrepresentation made to the insurer.

Commercial Securities Co. vs. Hall, 140 Ore. 644, 115 Pac. 2d 483.

Schmurr vs. State Insurance Co., 30 Ore. 29, 46 Pac. 363.

O.C.L.A. Sec. 101-1132 (3) (Waiver).

Under this point, counsel for the Appellant, totally ignoring the language of page 6 stating "this appeal confines itself to the two issues about which there was no contradictory testimony—namely, lack of ownership and insurable interest by and in the Appellees and unsea-

worthiness of the dredge," undertakes to discuss alleged misrepresentation and concealment by the Appellees at the time of the issuance of the policy. As a matter of law, the rule announced by counsel, that a failure to disclose the true interest voids a policy, is not sustained by any of the authorities cited. For example, in *Ohl vs. Eagle Insurance Co.* 18 Fed. Cas. No. 10, 473, discussed on page 40 Appellant's Brief, contains the significant language: "If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose that the parties deal with him upon the naked avowal of legal titles." In other words, even admitting, which we do not, that the interest insured had was a special interest and not that of owners, certainly the evidence of the circumstances surrounding the placing of the insurance showed that Mr. Knapp was placed on inquiry and that he declined to inquire (Tr. 205). The argument is made that the policy might have been a wagering policy, void in Oregon, (O.C.L.A. Sec. 101-1119) because one of the definitions of a wagering policy is one made "without benefit of salvage" to the insured. By various reasons appearing on page 42 of Appellant's Brief, counsel attempts to demonstrate that in case of a loss, no salvage would be obtained by the Insurance Company since the Appellees could not transfer a good title. We may best demonstrate the fallacy of this reasoning by stating that the Appellees did have a merchantable title, and could have transferred same to the Insurance Company had it become necessary or desirable. This is not a case where

title to merchandise has been found, in fact, reposing in a party other than the insured. We wish this Court to keep in mind that all the parties involved state that the Appellees had title to the dredge at the time it was insured. The agents of the Insurance Company admitted this fact even after the loss. The only person who states to the contrary is counsel for the Appellant, and we do not believe he is a competent witness. Even if there had been a provision in the policy requiring the Appellees to disclose their true interest, which there was not, this condition could have been waived. We believe the evidence is capable of the application of the rule that an insurance company cannot invite a misrepresentation or tacitly condone a concealment and later claim the policy was thereby voided. In *Commercial Securities Co. vs. Hall*, supra, it was held that a waiver is a voluntary relinquishment of one's known right and may be by acts of the party or by accepting benefits accruing on account of that waiver. The Court stated:

"The plaintiff herein seeks to void the forfeiture upon the ground, in part, that the defendant company, after full knowledge of all the facts upon which it now relies to establish the forfeiture, retained the premium paid.

"A like situation was presented in the early case of *Schmurr v. State Insurance Company*, 30 Or. 29, 46 P. 363. In that case the policy of insurance provided that all waivers of its provisions should be in writing. But the court held that, where a company has full knowledge of facts that render void one of its policies, retains the premium, and fails to cancel the policy, it waives the forfeiture, and this can be done by conduct or by parol, although the policy

itself provides that it shall be in writing. Waiver is a voluntary relinquishment of one's known right and may be by acts of the party or by accepting benefits accruing on account of that waiver."

A decision similar in effect is *Schmurr vs. State Insurance Co.*, supra, wherein the Court said:

"When the company, with knowledge of the violation of the provisions of the policy as thus communicated by Irle, retained the premium, and allowed the policy to remain uncanceled, it estopped itself from claiming a forfeiture on account of the barn, although its consent for its erection was not given in writing. The condition of the policy in this regard could be waived or modified by the defendant, and such waiver or modification could be made by parol, although the policy itself provided that it should be in writing. *Miner v. Insurance Co.*, 27 Wis. 693; *Webster v. Insurance Co.*, 36 Wis. 67; *Viele v. Insurance Co.*, 26 Iowa, 9. So that whether Irle's knowledge of the erection of the car barn would be binding upon the defendant or not is immaterial, because the company itself, after being advised of the breach, retained the premium, and took no steps whatever towards the cancellation of the policy, and therefore waived the forfeiture."

The evidence in this case shows that the original insurance coverage was issued to the Appellees on or about June 6, 1945; (Tr. 2) that on June 25, 1945, the Appellee, Frances M. Steinbach, gave her check for \$1250. to the agent of the Insurance Company. This check also covered towing from Coos Bay to Nehalem Bay, and the proceeds of the check with the exception of \$415.74 were retained by the agent. J. H. Corgan executed a check for \$187.50 covering towing charges from Nehalem Bay

to Tillamook Bay on October 30, 1945, and forwarded the check to the agent. It was assumed that no loss would ensue, in the event of which the premium would have been \$1250. This assumption was incorrect and the dredge became a total loss on November 1, 1945. However, the check was cashed by the agent on November 8, and the proceeds retained until November 30, when the Addison P. Knapp Co. attempted to return the sum of \$187.50.

Numerous Oregon decisions in addition to *Commercial Securities Co. vs. Hall* and *Schmurr vs. State Insurance Co.*, supra, hold that a condition of a policy may be waived. O.C.L.A. Sec. 101-1132 provides that it is the duty of the assured to disclose to the insurer every material circumstance known to the assured, and defines material circumstance as one "which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he would take the risk." Also "whether any particular circumstance, which is not disclosed, be material or not, is, in each case, a question of fact." The section also contains the following significant language (3) "in the absence of inquiry the following circumstances need not be disclosed namely: (a) any circumstance which diminishes the risk; (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance

which is superfluous to disclose by reason of any express or implied warranty." Both Addison P. Knapp and Emmett Rathbun were entirely familiar with all material circumstances affecting the risk of insuring the dredge. Mr. Knapp, as agent for the insurer, was told by John L. Steinbach that the ladies owned the dredge (Tr. 102). This was true. He did not tell Knapp that Capt. Hugh Corgan owned the dredge because Capt. Corgan did not (Tr. 102). If Mr. Knapp wanted further details he could have inquired, but he expressly waived such inquiry. The Appellant should not now be permitted to complain concerning any situation which was caused by its agent.

7, 8 and 9. The Appellees make no claim of insurable interest as wives, nor as joint tenants or part owners.

Even if their interest is not that of owners of the legal title to the dredge, the evidence supports a claim of equitable title, equally insurable.

Imperial Fire Insurance Co. vs. Dunham, 117 Penna St. 460, 2 A.S.R. 686.

Pacific State Fire Insurance Co. vs. Rowan Motor Co., 122 Ore. 665, 260 Pac. 441.

Hough vs. City Fire Insurance Co., 29 Conn. 10, 76 A.D. 581.

O.C.L.A. Sec. 101-1140.

We shall discuss points 7, 8 and 9 of the Appellant's Brief together, as they are purely abstract considerations

of law and add nothing to the argument of the case. The Appellees have never contended and do not now contend that they obtained insurance on the dredge based on the title of their respective husbands. In *Price vs. United Pacific Gas. Co.* 153 Ore. 259, 56 Pac. 2nd 116, discussed by the Appellant (Apt's. Br. 43) it was held that an estranged husband could not sue on a burglary and theft policy and recover for the loss of a diamond ring owned by his wife. The evidence showed that the husband and wife were not living in the same residence and, further, the wife did not believe the ring had been stolen. The Court properly denied recovery. *Oatman vs. Bankers Fire Relief Assn.* 66 Ore. 388, 133 Pac. 1183, cited by Appellant (Apt's. Br. 44), was an action on a fire policy. Deed to the property insured was in the name of the wife only. Consequently, a policy issued to the husband was void under the language of O.C.L.A. Sec. 101-1801 providing the form of all standard fire policies. The three cases cited under point 8 (Apt's. Br. 45) were not discussed by counsel. In *Manning vs. U. S. National Bank*, 174 Ore. 118, 148 Pac. 255, the Supreme Court of Oregon stated: "we know of no rule of public policy hostile to the enjoyment of the right of survivorship." As to the right of survivorship with which counsel for Appellant unnecessarily concerns himself (Apt's. Br. 45 and 46), we refer this Court to the *Manning* case cited by the Appellant, if such consideration seems necessary. As indicated, however, we have no serious argument with the language contained in points 7, 8 and 9, except to contend that such argument does not concern itself with any material issue on appeal.

It has been many times decided that title other than a legal title may be insured.

In *Imperial Fire Insurance Co. vs. Dunham*, supra, it was held that a purchaser of land under a written agreement has an insurable interest therein although the purchase money is unpaid, since so far as the insurance is concerned he is to be regarded as the entire, unconditional and sole owner. The Court said:

“At the time the insurance was effected, Seeley, as we have said, had become the purchaser in fee of the property under articles of agreement with T. Smull’s Sons; he had the equitable title only, but he was to all intents and purposes the ‘owner’ of the property; he was the equitable owner in fee, and in respect to the insurance, we think he may be said to have the entire, unconditional, and sole owner. This provision of the policy does not necessarily distinguish between the legal and the equitable estate. If the title is conditional or contingent, it is for years only, or for life, or in common, it is not the entire, unconditional and sole ownership; but the interest is the same, as it affects the contract of insurance, whether the title of the assured be legal or equitable.”

In *Pacific State Fire Insurance Co. vs. Rowan Motor Co.*, supra, it was held that equitable title coupled with actual possession bore all the incidents of legal title and was insurable. The Court said:

“The plaintiff seeks to show that the policy of insurance was null and void because of the asserted fact that the defendant possessed the motorcars as trustee, and not as sole and unconditional owner. In this state the equitable title, coupled with the ac-

tual possession of the property insured, bears with it all the incidents of legal title. *Baker v. Insurance Co.*, 31 Or. 41, 48 P. 699, 65 Am. St. Rep. 807; *Waller v. City of New York Ins. Co.*, 84 Or. 284, 164 P. 959, Ann. Cas. 1918C, 139."

Again in *Hough vs. City Fire Insurance Co.*, supra, which involved fire insurance on real property, it was held that an equitable interest is an absolute interest and insurable. The insured in this case had entered into an agreement for the purchase of property and had paid a considerable portion of the purchase money. The Court said:

"We think, too, that the evidence conduced to prove that the plaintiff's interest in that property was an absolute interest; that is an absolute interest in property, which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent. And by this contract with Eliakim Hough, and its part performance, the plaintiff had acquired a right to the whole property, of which he could not be deprived without his own consent. So, too, he is the owner of such absolute interest, who must necessarily sustain the loss if the property is destroyed. The subject of insurance was an interest, not a title. It is an interest, not a title, of which the conditions of insurance speak. The terms 'interest' and 'title' are not synonymous. A mortgagor in possession, and a purchaser holding under a deed defectively executed, have, both of them, absolute as well as insurable interests in the property, though neither of them has the legal title."

O.C.L.A. Sec. 101-1140 provides:

"Designation of Subject-Matter. The subject-matter must be designated in a marine policy with

reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured. (L.1921, ch. 354 Sec. 42, p. 665, O.C. 1930, Sec. 46-1140)."

10, 11 and 12. The interest of the Appellees is that of legal owners.

As between the parties themselves, title to personal property may be acquired by oral grant, and a written bill of sale is not necessary.

The Augustine, (D.C. N.Y. 1924), 8 Fed. (2d) 287.

Gaston Williams & Wigmore vs. Warner, 272 Fed. 56 (Affd. 260 U.S. 201, 43 Sup. Ct. p. 676 L. Ed. 210.

The Fitz vs. The Amelie, 6 Wall. 18, 18 L. Ed. 806.

Under points 10, 11 and 12, the Appellant claims that the Appellees were merely general creditors having no insurable interest in the dredge, and that assuming they were secured creditors they could not recover unless it was proven that the Steinbach Iron Works had no other property upon which to realize. With reference to being mere general creditors of the Steinbach Iron Works, we

can only reiterate that the evidence shows no such relationship. In *Vancouver National Bank vs. Law Union & Crown Insurance Co.* 153 Fed. 440, discussed (Apt's. Br. 47) it appeared that by the explicit admission of the parties the plaintiff had no other interest in the subject of the insurance except as a general creditor. In the present case no one, except counsel for Appellant, has ever advanced the proposition that the Appellees were mere general creditors of the Steinbach Iron Works. Consequently, what was said in the *Vancouver National Bank vs. Law Union & Crown Insurance Co.*, supra, and the *American Equitable Assurance Co. vs. Powdering Coal Co.* 221 Ala. 280, 128 S. 225, reflects little light on any proposition involved in this proceeding. Concerning the contention (point 12, Apt's. Br. 48), that if a creditor's claim is secured he must first attempt to recover upon other property of the debtor, we doubt that this is the law in Oregon. In fact, O.C.L.A. Sec. 101-1129 provides among other things: "(3) the owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding, that some third person may have agreed, or be liable, to indemnify him in case of loss.' This law plainly provides, so far as insurable interest is concerned, that it makes no difference whether the insured is able to look to someone besides the insurer for indemnity in case of loss. This law was enacted originally in 1921.

ants

In *The Augustine*, supra, the Court had for consideration the ownership of the former "Berengaria" which

had been involved in a collision. The Court stated:

"But the mere fact of ownership can be proved by the course of dealing, and I think the evidence was sufficient to show that the British government did own the steamship, and that the Cunard Company operated her for the government in the freight and passenger business between November 21, 1919, and February, 1921, and that then the company bought her and has operated her itself ever since, on its own account, in its own line. A ship is a piece of personal property, just like a carriage or a locomotive, and ownership may be proved by such evidence as the foregoing. Mere sale and delivery is enough to confer title. Documentations is for the purpose of fixing the status of a vessel as of the state whose flag she flies; and bills of sale and registration are for the purpose of giving notice to purchasers and mortgagees of the record of title."

Likewise it was held in *Gaston, Williams & Wigmore vs. Warner*, *supra*, that:

"As between the parties, the sale and delivery of a vessel passes the title at common law. The question of registration is another and distinct matter. The registration of a vessel is not compulsory, but a privilege and advantage, of which the purchasers may or may not avail themselves if they choose."

In *The Fitz vs. The Amelie*, *supra*, the Supreme Court of the United States said:

"The title of Reviere, the claimant, was questioned at the bar, because he did not prove the master executed to him a bill of sale of the vessel. We do not clearly see how this question is presented in the record, for there is no proof, either way, on the subject, but if it is, it is easily answered. A bill of sale was not necessary to transfer the title to the vessel. After it was sold and delivered, the property

was changed and no written instrument was needed to give effect to the title. The rule of common law on this subject has not been altered by statute."

13. The Appellees are the real parties in interest.

Fireman's Fund Insurance Co. v. Oregon R. & N. Co., 45 Or. 53, 76 Pac. 1075.

Blaser vs. Fleck, 96 Or. 187, 189 Pac. 637.

The Appellant, in contending that the action is not prosecuted by the real party in interest, cites Rule 17, Federal Rule of Civil Procedure, as well as Capital Fire Insurance Co. vs. Langhorne (C.C.A. 8), 146 Fed. (2) 237. If we follow his argument, counsel for Appellant seems to contend that the action should have been instituted in the name of Captain Corgan. However, Rule 17 itself provides that "a party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name * * *," so we fail to perceive the effect of the discussion. The Appellees were insured by the policy of insurance issued by the Universal Insurance Company. The Appellees and the Appellant were the only contracting parties. It should be unnecessary to cite authority holding that a party whose name appears to a contract may sue or be sued on it as a party in interest. In fact, it is impossible to ignore this relationship as a matter of law.

In *Blaser vs. Fleck*, *supra*, it was held that O.C.L.A. § 1-301 (Action must be in name of party in interest) was enacted to protect a party defendant from being harassed again for the same cause. The Court said:

"As we read the complaint in the case at bar, there is no allegation in so many words that the plaintiffs were joint owners of the property involved; yet the pleading was not challenged by a demurrer or otherwise. The defendants did not plead in their answer any facts showing that there was misjoinder of plaintiffs, or that the action was not prosecuted in the name of the real parties in interest. They were not deprived of any right to set up a counterclaim or set-off.

"There can be no question but that both of the plaintiffs would be bound by a judgment in the case, and that the same would be a complete bar to any future action for the property in question. The defendants would be completely protected from being harassed in the future for the same cause of action. Under the present status of the case, it is not a matter of consequence to the defendants as to how the plaintiffs adjust their property rights between themselves. The question as to the technical manner of pleading plaintiffs' ownership of the property was not open to the defendants upon a motion for a new trial."

In any event we hate to think what would have happened if Hugh Corgan had tried to recover on the policy.

14 and 15. There was no misrepresentation or failure to disclose all material circumstances by the Appellees or anyone representing them.

It is not apparent to the writer what distinction, if any, can be made between points 14 and 15 discussed at pages 51 to 55 of Appellant's Brief and point 6 at page 39 of Appellant's Brief, in which the charge of failing to disclose a true interest was made. We again re-

new our criticism of this phase of the Appellant's argument for two reasons. First, only under the most warped type of reasoning can anyone contend there was misrepresentation or failure to disclose material circumstances to the insurer. Second, counsel for Appellant has not confined himself to the two issues which he set for himself at page 6 of Appellant's Brief. O.C.L.A. Sec. 101-1132 is cited in support of point 14 but not discussed. We have previously discussed the provisions of this section at page 34 of this Brief. We ask the Court to examine the three "circumstances" mentioned at page 55 of Appellant's Brief, which counsel for Appellant states should have been disclosed. The first one "that the Appellees did not own the dredge, but were taking the insurance in their names so that in the case of a loss, the creditors of the Steinbach Iron Works could not levy on the money" never could have been a circumstance affecting the risk for at least two reasons. First, the Appellees did own the dredge, and the purpose of placing title in their name was of no concern to the insurer as long as it was actually so placed. Second, the purpose was not only to prevent creditors of the Steinbach Iron Works from acquiring the proceeds of any insurance policy in the event of loss that dictated the arrangement of placing title in the names of the two Steinbach women. Equally as important to the Steinbach family was the purpose of keeping the dredge itself out of the assets of the Steinbach Iron Works. The second circumstance mentioned by counsel for the Appellant is a pure absurdity. The third circumstance carries the same tag.

No one can read the evidence in this case, particularly with reference to the manner in which the hawser mentioned by counsel was obtained, and insist that a disclosure of its intended purpose should have been made. We say without fear of successful contradiction that no one knew what hawser would be used or where it would come from. In any event it was not a concern of the Appellees for the reason that there was no duty on the part of the insured dredge or its owners to furnish any hawser whatsoever. This phase of the case we will discuss under the second specification of error. Concerning the claim that the failure to disclose contemplated ownership of the dredge by a corporation with stock to be divided between the two Steinbach men and Captain Corgan, we may make two observations. First, this was a future arrangement which was never perfected. Second, even though the corporation were formed and took title to the dredge, the insurance policy terms included such a contingency and it would not have been voided.

SECOND SPECIFICATION OF ERROR

Under this specification of error Appellant (Apt's. Br. 55) states that the District Court erred:

1. In failing to hold that the dredge was unseaworthy at the commencement of the voyage because it was equipped with an insufficient towing hawser.
2. In failing to deny recovery because of the alleged breach of an implied warranty that the dredge would

be seaworthy at the commencement of the voyage.

3. In holding that the insufficiency of the hawser was not chargeable to the dredge.

STATEMENT OF FACTS

The Trial Court found (Finding VIII, Tr. 49) "that the said suction dredge 'Wishram' was seaworthy at the commencement of the said voyage." We concede that the Trial Court stated during the course of the trial that the hawser was part of the tug's equipment and not of the dredge.

"Mr. Phillips: My position is that there is no finding as to liability on the part of the dredge for that hawser under the facts and evidence of this case; that the seaworthiness of the dredge was not based on the hawser in any way.

The Court: You mean, it did not include the hawser?

Mr. Phillips: No.

The Court: Because the hawser was part of the tug's equipment and not of the dredge. I agree with you as to the legal proposition and reject your offer, Mr. Snow, to reopen the case on that basis. That seems to me to make the record." (Apt's. Br. 77-78).

The policy itself does not specify whether the tug or the dredge would furnish the hawser to be used in towing. Any suggestion in the Brief of the Appellant that under an implied warranty of the seaworthiness of the

dredge, the dredge owners were required to furnish a hawser suitable for towing is rebutted by the language of the Brief itself (Apt's. Br. 57). Here counsel for Appellant contends that in the original towing from Coos Bay to Nehalem Bay the tug "Umpqua Chief" furnished the hawser and states that when Mr. Rathbun surveyed the dredge on October 17, 1945, he thought the towing would be done by the "Umpqua Chief" by its own hawser. In fact, (at complete variance with the agreement of the parties concerned) an endorsement was added to the policy on October 24, 1945, covering "one trip from Nehalem Bay to Tillamook Bay, in tow of the tug, 'Umpqua Chief.' " The Trial Court determined that the provision for towing by the "Umpqua Chief" was inserted by the agent for the insurer without authority, and was not based on any representation or warranty by the parties insured. Counsel for Appellant concedes this point and states, "we do not raise it again" (Apt's. Br. 53). We mention this circumstance, however, to demonstrate to this Court how improbable it was that any of the contracting parties ever contemplated that the dredge "Wishram" would furnish a satisfactory hawser "thereby complying with the implied warranty of its seaworthiness." The Insurance Company itself undertook to write in the policy by endorsement a provision for towage by the "Umpqua Chief" which they knew would furnish its own hawser. Consequently, the criticism (Apt's. Br. 57) that neither Capt. Corgan nor J. H. Corgan told the Insurance Company that the towage was to be undertaken with a hawser borrowed from the Coast Guard is entirely irrelevant.

The fact, which is supported by the evidence, is that there was not only no representation as to what boat would do the towing but also there was never any intention that the dredge would furnish its own hawser. James H. Corgan testified:

"Q. Did Mr. Rathbun say that any boat you got would be all right?

A. He said we had to observe the weather and use our own discretion.

Q. He said it did not matter what boat he had?

A. He did not want a skiff. I had an idea that he knew what boat it was.

Q. Did you tell him at that time you intended to borrow a hawser for this towage?

A. No, we did not; didn't even know we would have to.

Q. You did not have in mind that time you might borrow a hawser for the towage, did you?

A. No, sir.

Q. The only equipment that you owned or that you knew you expected to use was the bridle that you had made?

A. That is right. A towboat usually furnishes their own hawser" (Tr. 162).

Hugh Corgan testified:

"Q. Had you known that the insurance company was insisting that the tow be made from Nehalem Bay to Tillamook Bay by the Umpqua Chief, would you have it towed by the Julia D?

A. Never" (Tr. 129).

He further testified:

"Q. I will ask you this: At the time of this discussion which you have referred to, in his office after the loss, was that the first time that you ever

heard anything about this tow being made by the Umpqua Chief? A. Yes, sir" (Tr. 132).

The evidence is that he did not see Exhibit 26-B, (Tr. 231) a letter addressed to Capt. J. H. Corgan, dated October 30, 1945, with reference to towing by the tug, "Umpqua Chief" until about November 5th or 6th (Tr. 211).

During the towing of the dredge by the boat the "Julia D" from Nehalem Bay to Tillamook Bay, two hawsers were used. The first hawser broke four or five times (Tr. 190). James H. Corgan testified that this hawser had been obtained from the Coast Guard loft, and that it was placed on the tow boat "Julia D." He said:

"Q. Then you brought Berg down to the boat, did you?

A. No, he drove his own car down.

Q. Then he ran his boat over to the Coast Guard boat house?

A. Yes, sir.

Q. Then you and Boster went in again?

A. Yes, sir.

Q. Did anybody have to let you in with a key this time?

A. The Coast Guard boy, yes, sir.

Q. You again climbed up in the loft and you let this hawser out through the window?

A. Yes.

Q. And Berg coiled it on the boat?

A. Yes, sir" (Tr. 161).

After the dredge and tow had begun the entrance into Tillamook Bay, another hawser was obtained. James

Brakeman, who was a passenger on the tow boat testified:

“Q. What happened just before the Wishram went on the rocks on the jetty there, about changing the towline?

A. The other one was a little short and they decided to get another one from the Coast Guard. I got off the fishing boat onto the Coast Guard boat and went along with them to get another hawser.

Q. Talk slower and more distinctly. What did you do?

A. Got off the fishing boat onto the Coast Guard boat and went in with them to get another hawser from the Coast Guard, brought it back in and changed the line.

Q. Where did you get that towline?

A. From the Coast Guard” (Tr. 170).

This second hawser did not break until after the dredge foundered on the jetty, and was still holding at the time it went on the rocks.

“Q. As a matter of fact, you had the hawser that the Coast Guard went in and brought out to you and fastened on with, isn’t that right?

A. Yes.

Q. That hawser did not break before you went on the rocks did it?

A. No.

Q. That hawser was still holding when you went on the rocks, isn’t that true?

A. That is right” (Tr. 190-191).

The foregoing facts are worthy of consideration for two reasons. First, if by any stretch of the imagination, it should appear that the towing hawser was part of the equipment of the dredge, and not the tow boat, an ade-

quate hawser was actually in use at the time of the foundering. A fortiori at the time of its loss, the dredge was seaworthy even under the reasoning of counsel for the Appellant. The breaking of neither hawser was a proximate cause of the loss. We dismiss as worthless of consideration the final paragraph of page 61 of Appellant's Brief, in which the manner of obtaining the hawser from the Coast Guard is questioned.

POINTS, AUTHORITIES AND ARGUMENTS

1. A policy of marine insurance may embody both a time and a voyage policy.

We make no criticism of this point relied on by Appellant (Apt's. Br. 62).

2. The dredge did not supply its own hawser.

Consequently, there could be no breach of implied warranty of seaworthiness of the dredge because of the condition of the hawser.

By point 2, (Apt's. Br. 62) it is stated that the breach of any warranty contained in a policy of marine insurance will invalidate the insurance regardless of the proximate cause of the loss. This is purely an abstract statement of law and its only application to the facts of the present proceeding appears to be the following assumptions of counsel for Appellant: (1) That the dredge supplied its own hawser; (2) That the hawser was defective; (3) That an implied warranty of seaworthiness

would be breached by furnishing a supposed defective hawser. These assumptions appeared at page 64, Appellant's Brief. Since any argument of counsel for the Appellant under this point is based on an assumption of fact which the evidence shows did not exist, we feel that this Court should not waste time in considering it.

3. There was no breach of any implied warranty of seaworthiness of the dredge.

The Quickstep, 9 Wall. (U.S.) 665, 19 L. Ed. 767.
The Britannia (DC, Va.) 148 Fed. 495.
Osterhoudt vs. Hedger Transportation Co. (S. D. N.Y.) 42 Fed. 2d 561.

We have no serious argument with the manner in which Appellant states its point 3 (Apt's. Br. 64) namely, that the policy was subject to an implied warranty that at the commencement of the voyage the dredge was seaworthy. We believe that at common law there was such a rule, (see 38 C. J. "*Marine Insurance*" Sec. 206 to 208 inc.) and we agree with counsel that the rule at common law is the law in Oregon. Therefore, we agree with what is said in City Motor Trucking Co. vs. Franklin Insurance Co. 116 Ore. 102, 239 Pac. 812, cited by counsel at p. 66, Appellant's Brief, except that the excerpt attributed to Hughes on Admiralty is in fact a statement which appears in 38 C.J. "*Marine Insurance*," Sec. 206 cited above.

At the expense of being repetitious we point out that both the facts and the law are opposed to the conten-

tions of counsel. The first hawser to be used in towing the dredge was physically placed on board the tug boat "Julia D" by its owner and master, Otto Berg (Tr. 161).

In *The Quickstep*, supra, it was held that the tug master is bound to see that the tow line is sufficient, and this duty is incumbent upon him whether the lines are furnished by the tug or by the tow:

"It is well settled that canal-boats and barges in tow are considered as being under the control of the tug, and the latter is liable for this collision, unless she can show it was not occasioned by her fault. *The Empress*, 1 Blatchf., C. C., 365, *Steamboat New York v. Rea*, 18 How., 223 (59 U. S. XV., 359).

"It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened, this was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault."

The same rule is applied in *The Britannia*, supra, wherein it was stated:

"It is no defense for the tug to say that the scow's six inch hawsers were not availed of because of their size and insecurity, and hence that they had to use their own broken hawser. The law imposed upon her the duty of making up the tow and seeing that proper lines were provided, either by the tow or herself. If those on the scow were inept for the service, others should have been provided before en-

tering upon the voyage, and for loss arising from such defective hawser, whether the same were furnished by the tow or tug, the latter is liable. These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damages for her negligence in this respect she should be held responsible."

In *Osterhoudt vs. Hedger Transportation Co.*, supra, the Court said:

"The hawser which broke had been supplied by the tug in accordance with the custom on the lake, and there is ample evidence to sustain a finding that at the time the tug delivered it to the barges, it was in a chafed condition which made it unsafe. This evidence is practically undenied and I am satisfied of the tug's negligence in using it. The fact that it had been furnished to the tug by the respondent, Hedger Transportation Company, does not relieve the tug nor make the respondent liable, because there is no evidence when it was furnished to the tug, nor that it was then in a dangerous condition."

Since counsel has not cited any authorities to the effect that failure to furnish a satisfactory hawser was a breach of the implied warranty of seaworthiness, we will continue to argue that there was no breach of this implied warranty.

4 and 5. Any negligence on the part of the tug or its operators does not affect the right of the appellees to recover on the insurance policy.

Under points 4 and 5 (Apt's. Br. 69) counsel injects the question of comparative negligence as between the

operator of the tug and the operator of the tow. We do not criticize the authorities cited under these two points, in fact, we rely on them, but agree with counsel that the question of negligence as between the tug and the dredge is not particularly relevant. Counsel states (Apt's. Br. 70) "we do not know what authorities the Appellees in the Trial Court could possibly rely on to support the idea that * * * the hawser thereby became a part of the equipment of the fish boat and the implied seaworthiness of the dredge was fulfilled." We answer this by saying that the evidence shows that the hawser was a physical part of the tug boat "Julia D" at the commencement of the towing from Nehalem Bay. The authorities we rely upon in this connection have been discussed under point 3 page 52 this Brief. We further suggest that if the Appellant is relying on the breach of any implied warranty, it had the burden of proving by satisfactory evidence that such warranty was breached. This burden has not been sustained. The Trial Court held it was not established that the "plaintiffs or their agents made any misrepresentations or violated any warranties to this defendant" (Tr. 49). Nothing that would justify a reversal of this ruling has been brought to the attention of this Court by the Appellant. We are satisfied that the finding was entirely justified and correct.

ATTORNEYS' FEES

The Appellees are entitled to, and hereby request, a reasonable sum as attorneys' fees incurred on this ap-

peal, to assessed by this Court. The sum of \$1500.00 is a reasonable sum to be allowed to the Appellees in this respect.

Hagey vs. Massachusetts Bonding & Insurance Co., 169 Ore. 132, 127 Pac. 2d 346.

The law of the forum controls the allowance of attorneys' fees.

Horwitz vs. New York Life Insurance Co. (C.C.A. 9, 1935) 80 Fed. 2d 295.

O.C.L.A. Sec. 101-134, provides in part:

"If attorney fees are allowed, as herein provided, and on appeal to the Supreme Court by the defendant the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the Court shall adjudge reasonable as attorney fees of the respondent on such appeal."

CONCLUSION

In concluding we wish to call to this Court's attention the significant language contained in the letter of October 30, 1945, (plaintiff's exhibit 26-B, Tr. 231) written to Capt. J. H. Corgan at Garibaldi, Oregon, and signed by Addison P. Knapp, first, parenthetically observing that the letter was addressed to the wrong person at an improper address. In this letter the premium of \$187.50 was rejected. The reason given for its rejection: "the company's reason for being unwilling to accept the remittance is based on the fact that the Suction Dredge 'Wishram' was not towed from Nehalem Bay to Tilla-

mook Bay by the tug 'Umpqua Chief' as called for by the endorsement." This was the only reason assigned by the agent for the Insurance Company for denying liability under the policy. It was abandoned on appeal (Apt's. Br. 53). It was not until the Appellant prepared its answer that it contended that the policy was void because the Appellees did not own the dredge (Tr. 33-34) or that the implied warranty of seaworthiness was violated because of the use of a defective hawser. This change in attitude is not impressive particularly in view of the fact that the insurance company accepted and retained many hundreds of dollars of the Appellees money for premiums.

We respectfully urge that the judgment and findings of the Lower Court be sustained.

Respectfully submitted,

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W. K. PHILLIPS,

WM. C. RALSTON,

Attorneys for Appellees.

APPENDIX A

O.C.L.A. Sec. 101-1129: (Insurable Interest—Quantum of Interest)

“(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss. (L. 1921, ch. 354, Sec. 31, p. 665; O. C. 1930, Sec. 46-1129).”

O.C.L.A. Sec. 101-1132: (Disclosure and representations)

“(3) In the absence of inquiry the following circumstances need not be disclosed, namely: (a) any circumstance which diminishes the risk; (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance which is superfluous to disclose by reason of any express or implied warranty.”

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

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FILED

MAY 10 1941

PAUL P. ORRIS

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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

NO CONTRADICTORY EVIDENCE

The Appellees in their brief do not challenge the statement made in Appellant's main brief that with respect to the two main issues raised by this appeal there is no contradictory evidence. Appellees except to our arguments and the inferences which we think should be drawn from the evidence but do not point to any disputing evidentiary facts.

DREDGE WISHRAM TRANSFERRABLE ONLY IN WRITING

Appellant, at page 27 of its brief, argues that the Dredge WISHRAM was a vessel and therefore could be transferred only in writing under the Oregon statute or under the Federal statute. Appellees, on page 15 of their brief, argue that the dredge was not a vessel and that title could be transferred by parol. Even if the Ninth Circuit had not held that a dredge is a vessel there is no room for dispute on this point. 1 U.S.C. 3; *Ellis v. U. S.*, 206 U.S. 246, 50 L. Ed. 1047, 27 S.C.R. 600; *Alabama*, (D.C. Ala.) 19 Fed. 544; *Alabama*, (D.C. Ala.), 22 Fed. 449; *Pioneer*, (D.C. N.Y.), 30 Fed. 206; *Fidelity Trust & Vault Co. v. Mobile St. R. Co.*, (C.C. Ala.), 53 Fed. 607; *International*, (D.C. Pa.), 83 Fed. 840; *McRae v. Bowers Dredging Co.*, (C.C. Wash.), 86 Fed. 344; *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, (D.C. N.Y.), 148 Fed. 290, aff'd (C.C.A. 2), 153 Fed. 870.

No Oregon case holds that a dredge is not a vessel. Appellees cite *Yarnberg v. Watson*, 13 Ore. 11, but this case holds that it is a question for a jury at what point an incomplete structure on the ways, intended eventually to become a steam schooner, ceases to be an aggregation of parts and becomes a vessel.

It does not lie in the mouths of the appellees to deny that the Wishram was a vessel inasmuch as they purported to insure their supposed interests therein under a marine insurance policy including the American

Hull Pacific Endorsement, wherein the Wishram is referred to over and over again as a "vessel" (R. 62-66). If appellees did not think the Wishram was a vessel why did they pretend to insure it as such?

The dredge WISHRAM was a vessel. Both the Oregon and the Federal statutes of frauds prevents transfers of vessels except by writings. The Oregon statute governs, because the Wishram was not subject to registration, enrollment or license under United States law.

GOVERNMENT ENGINEERS' LETTER SATISFIES OREGON STATUTE

Appellees on page 8 of their brief argue that the letter from the Government Engineers to Captain Corgan (Appellant's Brief 10) does not constitute a written transfer of the dredge within the meaning of the Oregon statute. This statute reads as follows (Appellant's Brief 29):

"2-907. A sale or transfer of a vessel is not valid unless it be in writing and signed by the party making the transfer."

The Oregon statute does not require any particular formula of words to constitute a transfer. The Government Engineers' letter acknowledges payment for the dredge, describes it sufficiently for identification, and is signed on behalf of the Government.

This letter was delivered to Captain Corgan, who took delivery of the dredge pursuant to the authority

contained in it. There is no possible doubt about the meaning of the letter. It was intended to serve as a document of title to the dredge. Captain Corgan himself referred to the letter in his May 29, 1946 deposition as a bill of sale "in the form of a letter addressed to me," which is exactly what it was (Appendix to this brief).

CAPTAIN CORGAN'S MAY 29, 1946 DEPOSITION

Appellees at page 5 of their brief take exception to our statement that Hugh Corgan did not disclaim interest in the dredge until the trial. Affirmative disclaimer is different from failure to claim at any particular time. Appellees say that Captain Corgan disclaimed interest in the dredge when his testimony was taken May 29, 1946. This is not true. *Captain Corgan then claimed to be an owner of the dredge subject to a loan by or a mortgage to the four members of the two Steinbach families, secured by the policy of insurance in the names of the two Steinbach ladies.*

Captain Corgan's deposition of May 29, 1946 is before this Appellate Court as Pre-trial Exhibit 6, although it has not been printed in the record. Since it has now been brought into the case by Appellees (their brief page 5) we print as an Appendix to this brief the parts of this deposition which bear especially on ownership of the dredge, eliminating repetitious matter.

APPELLEES HAD NO LEGALLY ENFORCEIBLE RIGHTS IN THE DREDGE

The Appellees on page 19 of their brief argue that the "defense" of the Statute of Frauds is not available to the Appellant. Appellant does not set up the Oregon Statute requiring writing in order to effect transfer of the dredge as a "defense". The Oregon statute is only one of many reasons why the Appellees did not own the dredge. Beside taking no written transfer of the dredge the Appellees parted with no consideration or value; took no delivery; never had possession or control of the dredge; became neither trustees nor trustors; and acquired no mortgage or lien of any kind. All of these reasons together deny to the Appellees any semblance of title or ownership, or insurable interest of any kind.

Appellees cite *Roberts v. American Alliance Company*, 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310. Here two brothers purchased farm property and took legal title as tenants in common. They then effected a partition by means of a survey and plat of the property, and each severally took possession of his own part. One of the brothers insured a building on his portion, and the policy was held valid. The partition was complete except for the exchanging of formal deeds and either brother could have gone into equity and secured specific performance.

It is common doctrine that an interest to be insurable must be one which the law will recognize and protect.

In re Reynolds Estate, 94 Vt. 149, 109 Atl. 60. A lessee with an unexecuted option to purchase has no insurable interest. *Finlon v. National Union*, 65 Ore. 493.

A vendee under an oral contract to purchase real estate is not an unconditional owner unless, because of part performance or other facts, he could enforce specific performance and thereby secure title. *Palmetto Fire Insurance Co. v. Fensler*, 143 Va. 844, 129 S.E. 727; *Mott v. Citizens Insurance Co.*, 123 N.Y.S. 400.

A contract by which an owner agrees to sell personal property unaccompanied by a transfer of possession effects no change of interest and a policy insuring the original owner is valid. *Elder v. Insurance Co. of North America*, 206 Ill. App. 172, N.E. ; *German American Insurance Co. v. Shepherd*, 78 Ind. App. 314, 126 N.E. 447.

Appellees' attempt to distinguish some of the Oregon cases cited in Appellant's Brief on the basis of the Standard Fire Policy Law which was in effect when some of these cases were decided. But there is no distinction between the ownership claimed on behalf of appellees by John L. Steinbach and Captain Corgan and the sole and unconditional ownership described in the standard fire policy act.

APPELLEES' INCONSISTENT THEORIES OF OWNERSHIP

As Appellant pointed out in its main brief (7-8), the issue is ownership, but the trial court found only that the Appellees were "proper parties" to insure. Appellees in their answering brief now do not attempt to sustain this finding, but claim that the Appellees were the owners of the dredge.

They do not spell out any definite theory of ownership, but assert ownership in several different ways, always upon a nebulous foundation. Chiefly, Appellees rely on positive assertions that they had title to the dredge, repeated dogmatically throughout their brief (Pages 12, 26, 28, 32, 35). For example, referring to the promissory note and ledger pages evidencing the debt from the Steinbach brothers to Frances Steinbach (Appellant's Brief 12, 24), Appellees say at page 27:

"These constitute bookkeeping entries for the convenience of the parties concerned, and do not militate against the fact, as the evidence shows elsewhere, that the Appellees owned the dredge."

In connection with these flat claims of ownership the Appellees entirely fail to show how they got title. They simply say they own the dredge because their husbands said so in course of a family conference (Appellees' Brief 26).

On page 35 of their brief they put forward a hazy and indistinct claim to be the "equitable" owners of the dredge. Equitable ownership basically means a financial

interest in property the legal title to which is in another, usually a trustee. Appellees are inconsistent in claiming both legal and equitable ownership in the dredge. And if they conceive legal ownership in someone else in order to claim equitable ownership in themselves, in whom do they place this legal ownership? Surely not in Captain Corgan, for in the face of the Government transfer to him and his failure to execute by written transfer to anybody else they still deny that Corgan had legal title to the dredge.

Moreover, on what do they rely to create their equitable ownerships? The unsecured obligation of the Steinbach brothers to Frances Steinbach does not give her an equity in the dredge. And Carolyn Steinbach, who paid nothing to anybody, what kind of an equity can she have?

Appellees have still a third theory of ownership which is quite inconsistent with their claims of legal title and equitable ownership. This third claim is also indistinct and hazy, but it comes to something like this.

Appellees say on page 7 of their brief that Captain Corgan purchased the dredge as agent for the "Steinbachs", without specifying which of them he was agent for, and that he himself had no further interest in it. They then continue with their theory of communal property, altogether unsupported by authority, as follows (Appellees' Brief 14):

"We do not believe that John L. Steinbach spoke an untruth in saying 'Well, what's mine is hers'."

Again on page 22 they quote John L. Steinbach as follows:

“A. She will get her \$1,650.00 back, but we hold our property in common. If I make a loss, she loses too.”

This last theory of ownership, then, is to the effect that Captain Corgan bought the dredge as agent for the Steinbachs, apparently all four of them; the four Steinbachs hold their property in a communal manner among the two families, or at least each husband and wife does; thereby the *two ladies became the owners in common with their husbands*.

This theory of ownership is impossible under the Oregon law. Even if it were not, it would not support recovery on this policy in which the two ladies are insured as the owners, not as part owners (Appellant's Brief, Points 5, 6, 7, 8, 9, pages 37 to 46).

POSSIBILITY OF SALVAGE TO INSURER

Let us examine Appellees' several theories of ownership of the dredge in relation to the position of the Appellant upon paying a loss.

O.C.L.A. 101-1119 provides that a wagering marine insurance contract is void and that a contract is deemed wagering where the insured has no insurable interest and does not expect to acquire one, or where the policy is made “without benefit of salvage to the insurer”, provided there is a possibility of salvage to the insurer.

Of course if the Appellees had a clear legal title unfettered by the rights and claims of others as Mr. Knapp believed and had a right to believe when he issued the policy, the Appellant could take its salvage from them and pursue its subrogation in their names.

But Appellees took no written transfer, paid no purchase price, took no delivery, and were never in possession of the dredge. They could not make a written transfer of any salvage and they could not prove damage in them alone upon a suit to recover for the loss.

Now, we ask the court to consider where this Appellant stands on the matter of salvage if the Appellees are deemed to own the dredge because their husbands own it and because Appellees own their husbands' property in common with them. Let us suppose again the dredge on the beach, a claim by Appellees for a constructive total loss, a prospect willing to buy the dredge from the insurance company for half the amount of the insurance, desire of the insurance company to pay the loss and realize its salvage (Appellant's Brief 41-42). If the Appellees owned the dredge in common with their husbands, the husbands could not be required to join the Appellees in a transfer of the dredge to the insurance company or its nominee, because they were not assureds.

Thus the company has been induced by misrepresentation of ownership to execute a policy without benefit of salvage to the insurer in a case where there is a possibility of salvage.

There is still another possibility of salvage; namely the claim against the Otto Berg and Otto Berg, Jr. for negligent loss of the dredge. The trial court refused to hear this third party case. How could the Appellant stand in the shoes of the Appellees in respect to the claim against the Bergs and prove damage to them alone if the dredge was owned in common by the Appellees and their husbands? The Appellant could not be subrogated to any right the Steinbach husbands might have against the Bergs, because the Steinbach men, though owners of the dredge in common with their wives, were not assureds under the policy.

If Appellees had an "equitable" interest in the dredge the Appellant, having paid them upon a loss, could have no possibility of salvage or right of subrogation, because they could neither control the dredge as property nor sue to recover for its loss.

Or if Captain Corgan was the owner of the dredge as we contend then the Appellate could not prosecute a claim against the Bergs in the name of and in the right of Captain Corgan because he was not an assured.

The Appellees have not attempted to answer these important questions. They are content to see the insurance company deprived of its salvage, but that is not the intention of the Oregon statute. The statute says that the insurance company shall not contract away its right of salvage if there is a possibility of salvage, as there is in this case.

If Frances Steinbach is considered to have an insur-

able interest to the extent of \$1,650.00 the unpaid amount of her debt owing from Steinbach Iron Works, then she might recover to that extent only and the Appellee would be subrogated against Steinbach Iron Works for the amount.

But it will be remembered that this money is due her on an unsecured promissory note. She never had any lien against the dredge nor any other right against the dredge which might be made the subject of an insurance.

We need only add that Carolyn Steinbach is an absolute blank as far as any possibility of interest, salvage or subrogation is concerned, other than sentimental.

CONCEALMENTS AND MISREPRESENTATIONS

Appellant in its brief (pages 17-20) discusses the evidence of John L. Steinbach, Captain Corgan and Mr. Knapp concerning the meeting in Mr. Knapp's office in June, 1945. The three men all told the same story of what occurred at this interview. Appellant in its main brief (51-55) discussed the law relating to these misrepresentations and failures to disclose.

The above two portions of Appellant's brief have produced from Appellees a variety of answers. Appellees says on page 12 of their brief that

"The internal affairs of the two Steinbach families were of no concern to the Universal Insurance Company or Mr. Addison P. Knapp."

Having thus denied the right of the Appellant's agent to know the facts of which disclosure was withheld, the Appellees continue on page 31 of their brief:

"Certainly the evidence of the circumstances surrounding the placing of the insurance showed that Mr. Knapp was placed on inquiry and that he declined to inquire."

Surely the Appellees cannot seriously complain of Mr. Knapp's failure to inquire about something he had no right to know. The fact is that Mr. Knapp had every right to know about the internal affairs of the Steinbach family because the ownership of the dredge he was proposing to insure was tied up therein.

But by what was Mr. Knapp placed on inquiry? Mr. Steinbach or Captain Corgan had the Engineer's title letter in his pocket, yet Mr. Steinbach said the ladies had bought the dredge with their money and owned it. Mr. Knapp knew nothing of the Engineer's letter. He took the statements of Mr. Steinbach and Captain Corgan at their face value, as he had a right to do in view of O.C.L.A. 101-1132, 1133, and 1134 (Appellant's Main Brief 18 and 40).

But Appellees have still another inconsistent set of answers to the portions of Appellant's brief dealing with failures to disclose and misrepresentations. They say on page 13 of their brief that Mr. Knapp was never misled by them.

We find the Appellees arguing first that Mr. Knapp had no right to know the circumstances withheld from

him and concerning which misrepresentations were made; secondly that he was placed on inquiry and declined to inquire about the things he had no right to know of; thirdly that he knew the truth anyway, and was not mislead.

The record gives no support to Appellees' contention that Mr. Knapp was not deceived. He had no means of knowledge other than the words of Mr. Steinbach and Captain Corgan.

To top the climax of this structure of inconsistency the Appellees say on page 32 of their brief, although they do not say it directly because it would be a gross perversion of the testimony, that Mr. Knapp invited the misrepresentations and condoned the concealments. No evidence supports this shot in the dark.

Appellees in their brief on pages 11 and 12 refer to Mr. Knapp's testimony that if told that the Government Engineers had transferred the dredge to Captain Corgan he would not have issued the policy to the ladies but would have told Mr. Steinbach and Captain Corgan that the proper way to insure the dredge would be in the name of whoever might hold the title to it (Appellant's brief 23 and 53). They then draw the unsound conclusion that Mr. Knapp meant that he did not care whose money bought the dredge provided it was insured in the name of the party who had the legal title.

This is not correct. Mr. Knapp did not convey that meaning. If it appeared to him that one party paid the money and another party took the title he would natu-

rally want to know the relationship between the two parties. But he was not told that one party paid the money and another party took the title. He was told (198) that the dredge was being purchased in the names of the women "with their money" (Appellant's Brief 17).

The exceptions of O.C.L.A., Section 101-1132, do not apply to this case as claimed by Appellees on page 34 of their brief. Nothing encompassed by the misrepresentations and failures to disclose has to do with diminishing the risk; nothing was of a kind which would be presumed to be known by the insurer; nothing was waived by the insurer, nothing was made superfluous by express or implied warranties.

WAIVER AND ESTOPPEL

The appellees contend in various parts of their brief that the Appellant has waived the defenses set up on this appeal. There are a good many answers to this contention and to state them all fully would probably extend this Reply Brief to an unreasonable length. We concede, of course that an insurance company can waive defenses or can be estopped to assert defenses based upon clauses placed in its policy for its own benefit. But the position of the Appellees is vastly different.

Appellees rely upon prohibitory statutes of the State of Oregon, not upon the conditions of their own policy. These statutes are as much binding on the Appellant as on the Appellees. Neither party can waive or disregard their provisions. The Oregon court has said very

pertinently about a similar prohibitory statute in *Rhodes v. Equitable Life*, 109 Ore. 586, 594; 220 Pac. 736:

“The insurer cannot waive the statute.”

The requirement of insurable interest is absolute and lack of it is not excused by good faith on the part of the assured or by waiver or estoppel on the part of the insurer. *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; *Patterson v. Durand Farmers Mutual*, 303 Ill. App. 128, 138, 24 N.E. (2) 740; *Hirsh v. City of N. Y. Ins. Co.*, 218 Mo. App. 673, 267 S.W. 51; *Davis Wood Lbr. Co. v. Insurance Co. of No. America*, La., 154 So. 760, 767.

The first of the above cases, *Agricultural Ins. Co. v. Montague*, is a leading authority. Personal property belonging to a wife was insured in the name of the husband. This was done with full knowledge of the facts by the insurance company and with its full consent and attempted waiver. Nevertheless the policy was held void for want of insurable interest.

The main ground of waiver and estoppel relied on by Appellees is that on November 30, 1945, long before the commencement of this action, the Appellant denied liability by reason of breach of warranty in that the towage was undertaken by the fish boat instead of by the approved tug (Tr. 234).

The Appellees pleaded no waiver or estoppel in their complaint and offered no evidence tending to prove

waiver or estoppel. It is too late for them to urge this cause of suit on this appeal. *Waller v. City of N. Y. Ins. Co.*, 84 Ore. 284, 293.

Appleman in his new work on insurance defines and distinguishes waiver and estoppel as follows (16 Appleman 594):

“ ‘Waiver’ is voluntary relinquishment of a known right * * * * .”

“ ‘Estoppel’ * * * * necessarily implies prejudicial reliance of the insured upon some act, conduct, or nonaction of the insurer * * * * .”

Neither waiver nor estoppel will be implied as against an insurer to prevent the insurer from asserting a fact by way of defense of which it had no knowledge at the time of the act constituting the alleged waiver or estoppel (Appellant's Brief 4). *Obartuch v. Security Mut.* (C.C.A. 7) 114 F. (2) 873, 881, Cert. den. 312 U.S. 696, Reh. den. 312 U.S. 716; *Ins. Co. v. Wolf*, 95 U.S. 326, 333, 24 L. Ed. 387; *Home Life v. Meyers*, (C.C.A. 8) 112 F. 846, 852; *Keehn v. Excess Ins. Co.*, (C.C.A. 7) 129 F. (2) 503, 505.

Where an insurance company denies liability on one ground it is not precluded from setting up a defense on another ground unless the insured was lulled into security as to the second defense by the denial. *Goodwin v. Federal Mutual Ins. Co.*, ... La. App. ... , 180 So. 662; *Mitchell v. American Mutual Assn.*, 226 Mo. App. 696, 46 S.W. (2) 231, 237; *Slater v. General Casualty Co.*, 344 Pa. 410, 25 Atl. (2) 697.

Respectfully submitted,

MACCORMAC SNOW,
Attorney for Appellant.

APPENDIX

(Excerpts from Pre-trial Exhibit 6, deposition of Hugh Corgan, taken in this case at Portland on May 29, 1946. Italicized parts are corrections made by Captain Corgan.)

- (4) "Q. By whom were you so employed?
A. Well, it would be the Coast Dredging & Construction Company, Ltd.
Q. Is that a corporation or a partnership?
A. A partnership.
Q. Who are the partners?
A. There is John Steinbach, Dave Steinbach, and J. H. Corgan, and myself.

* * * * *

- (5) Q. Did this partnership own the dredge Wishram before the loss of the dredge?
A. Well, it is a good deal the same as my house out there; I own it when it is paid for.

* * * * *

- (6) Q. Was it a mortgage or a contract of purchase?
A. Well, I would say it was a mortgage because we had a loan. Wouldn't that be right, Mr. Winslow?

MR. WINSLOW: Well, of course, I can't answer.

Q. There was a loan against the dredge, was there?

A. There was borrowed money.

Q. The partnership borrowed money on the security of the dredge?

A. Yes.

Q. How much money did the partnership borrow on the dredge?

* * * * *

- (6) A. Well, it is kind of a peculiar circumstance. When it comes to the amount as far as Jimmy and

I were concerned, it was all borrowed. The Steinbachs put up the money, the women and the men.

* * * * *

- (8) Q. To whom did you and your son become indebted for your interest in the dredge?

A. To the Steinbachs.

Q. To the women or the men?

A. Both.

* * * * *

- (8) Q. Did the partnership purchase the dredge or did somebody else purchase it and sell it to the partnership?

A. I acted as agent.

* * * * *

- (9) Q. Did you purchase the dredge in your name and sell it to the partnership?

A. I purchased it in my name with the Steinbach checks and turned it over to Steinbachs.

Q. Who issued the checks?

A. Mrs. Steinbach issued part of them, and John Steinbach and Dave the other part.

* * * * *

- (11) Q. Who paid the money that was necessary to fit the dredge for the towage from Coos Bay to Nehalem Bay and for the insurance premium and the other expenses that the dredge incurred?

A. Well, the Steinbachs, John and Dave paid part of it and the Steinbach women paid what we were short—or what they were short.

Q. Did the Government issue a bill of sale at the time of your purchase of the dredge from the U. S. Engineers?

A. Yes. *In the form of a letter addressed to me.*

* * * * *

- (12) Q. Who was the purchaser named in the bill of sale?

A. Myself. *That is, the letter was address to me.*

Q. Did you issue a bill of sale to anybody for the dredge?

A. No, I just turned the bill of sale over to the Steinbachs, as I was their agent.

Q. Who was the party who loaned the money on the dredge that you referred to when you spoke of the mortgage on it?

A. The Mrs. Steinbachs and the men, the two Steinbachs.

Q. The two ladies and the two men?

A. Yes.

Q. To whom did they loan the money?

A. To the two men, John and Dave.

Q. Do you know whether or not a mortgage was actually issued or executed in respect to the dredge and on the dredge as security for that loan?

A. Well, all I know is that they were supposed to be—or they were secured by the insurance policy. That was the chance they were taking.

Q. Now, was there a written partnership agreement on the organization of the Coast Dredging & Construction Company?

A. Yes.

* * * * *

(14) Q. Was your sole occupation from June, 1945 until November, 1945 the management and operation of that dredge?

A. Yes, sir.

* * * * *

(14) Q. Did you receive a salary for that service?

A. Well, part of the time.

Q. From whom did you receive the salary?

A. From the Coast Dredge & Construction Company.

Q. Was that salary paid by checks?

A. Yes, sir.

Q. And were the checks signed by the Coast Dredging & Construction Company?

A. They were signed by J. H. Corgan, who was Secretary and Treasurer.

* * * * *

(15) Q. Did your son Jim get a salary?

A. The same as myself, part of the time.

Q. Did either of the two Steinbach men get salaries?

A. No.

Q. Did either of the two Steinbach ladies get salaries?

A. No.

* * * * *

(16) Q. Would you describe yourself as the General Manager or Captain of the dredge?

A. General Manager.

* * * * *

(21) Q. Who instructed the company to issue the insurance policy in the names of the two Steinbach ladies?

A. I did.

Q. Upon whose direction did you give Knapp and Rathbun that instruction?

A. Well, we talked it over among we four. They wanted security. Therefore, I was given authority to grant that wish. In fact, they insisted.

Q. Who gave you the authority?

A. Well, you might say the women as well as the Steinbachs. The women insisted on security.

Q. When you say that 'we four talked it over,' do you refer to yourself, Jim, and John and Dave Steinbach?

A. Yes.

Q. And did you also talk it over with the two ladies?

A. No. Their husbands were acting for the ladies.

Q. It was really then, was it, John and Dave Steinbach who instructed you to issue the policy in the names of the two ladies?

A. Yes.

Q. Your son didn't have any voice in the matter in particular, did he?

A. Not at that time.

Q. Nor yourself?

A. Well, yes, because I was one of the ones that was the borrower."

* * * * *

"All references made by me in the testimony given in this deposition to a written partnership agreement under the name Coast Dredging & Construction, Ltd. refer only to such written agreements as were executed on and after July 23, 1945."

In the United States
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Appellees.

APPELLANT'S BRIEF ON
SUPPLEMENTAL FINDINGS OF FACT

Upon Appeal from the District Court of the United
States for the District of Oregon.

FILED

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CLERK

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APPELLANT'S BRIEF ON
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Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE

There is no dispute or contradiction in the testimony relating to the question of the ownership of the dredge Wishram and insurable interest. The problem presented to the District Court of Oregon by the Circuit Court of Appeals in the Order of May 17, 1948, was to draft a statement of ultimate fact correctly setting forth the meaning of the evidentiary details.

The complaint alleged:

“That during the times herein mentioned the plaintiffs were the owners of a suction dredge named ‘WISHRAM’.”

The amended answer denied the above allegation and alleged affirmatively the ultimate facts on insurable interest as shown by the testimony. At the conclusion of the trial the attorneys for the plaintiffs (appellees here) exhibited their lack of confidence in the evidence relating to the above allegation of ownership by tendering to the trial court as a Finding of Fact:

“That the plaintiffs are and were at all times herein mentioned proper parties to insure a certain suction dredge named the ‘Wishram’.”

The trial court exhibited a like want of confidence in this testimony by signing the above finding. In its brief and at the oral argument appellant pointed out that this finding is not a Finding of Fact but is a conclusion. The case was argued May 14, 1948, and on May 17 the Circuit Court of Appeals made an order pointing out that the District Court had made no finding of fact on the issue of ownership, and providing:

“Therefore, the trial court is hereby directed to make and file findings as to (1) whether, during the times mentioned in the complaint, plaintiffs or either of them owned the dredge Wishram or any interest therein; (2) the nature, character and extent of such ownership or interest, if any; and (3) how, when and from whom such ownership or interest, if any, was acquired.”

On May 24, 1948, pursuant to the above order a short hearing was had before the district court. The writer of this brief was then engaged in a trial, and

the District Court directed a further hearing at a later date. This took place June 10, 1948. (Supplemental Transcript) At the second hearing the appellant filed a typewritten brief and argued the case at some length.

Between May 24 and June 10 the District Court prepared proposed supplemental findings and sent them to counsel. The attorney for appellees filled in the engineer's letter. A day or two after the conclusion of the June 10 hearing the District Court signed and filed these findings. (Supplemental Transcript 19-20)

The substance of the trial court's supplemental findings is as follows:

"Prior to the purchase of the Dredge, the Steinbachs and their wives conferred about the advisability of making the purchase and operating the Dredge, and it was decided to put the Dredge in the wives' names, because (1) the Steinbach brothers had an unadjusted wartime contract in their own business that was troubling them (2) they had an agreement with Captain Corgan that he and his son should have a third interest in the Dredge, after the cost of buying and moving it had been paid out of the profits the Dredge was expected to make.

"The ownership of the Dredge by Francis and Carolyn Steinbach was complete, subject to working out of the plans aforesaid, and this was fully understood by Captain Corgan, as well as the Steinbach brothers and their wives."

Let us look at the supplemental findings in reference to the requirements of the Circuit Court of Appeals.

The first question of this court is whether plaintiffs or either of them owned the dredge or had any interest therein. The answer to this question is not direct but, taken by their four corners, the supplemental findings are to the effect that the ladies owned the dredge.

There is no finding that they had any interest in the dredge other than ownership. No form of insurable interest is predicated upon the loan made by Frances Steinbach to the Steinbach Iron Works. No claim is made for the theory advanced by Mr. and Mrs. Steinbach that "what's mine is hers", which if followed literally would lead to ownership, not by the ladies, but in common by the men and their wives. There is no claim of any equity lien, mortgage, advance or other form of insurable interest.

The second question calls for a statement of the nature, character and extent of the ownership. The answer is to be found in the last paragraph of the supplemental findings:

"The ownership of the Dredge by Francis and Carolyn Steinbach was complete, subject to working out of the plans aforesaid, and this was fully understood by Captain Corgan, as well as the Steinbach brothers and their wives."

We take it that the work "complete" means exclusive. The ownership by the ladies is described to be temporary and indeterminate in length. It is subject to the working out of the "plans aforesaid." These plans amounted to future intentions,—namely, the adjustment of the wartime tugboat claims, and the con-

tract between the Steinbach brothers and Captain Corgan whereby each was to have one-third interest in the dredge.

This finding does not recite whether the women held the dredge in common, jointly, or otherwise. (Appellant's Main Brief 45)

The third question asked by this court is how, when and from whom the appellees' ownership was acquired. The answer is as follows:

"Prior to the purchase of the Dredge, the Steinbachs and their wives conferred about the advisability of making the purchase and operating the Dredge, and it was decided to put the Dredge in the wives' names, . . ."

The District Court also adds in the last paragraph:

"this was fully understood by Captain Corgan, . . ."

There was no evidence that Captain Corgan knew anything about the family conference, as we will point out later. The District Court made no finding that any consideration or value passed from either of the ladies; that any written conveyance was made by Captain Corgan or either of the husbands; that the husbands had any legal title to the dredge at the time of the family conference; that the ladies or either of them took delivery of the dredge or ever had possession thereof; that the ladies became either trustees or trustors of said dredge on any trust expressed or implied; that the ladies or either of them ever appointed Captain Corgan to act as their agent, or that Captain Corgan so acted

in buying the dredge; or that either John L Steinbach, David E. Steinbach or Captain Hugh Corgan ever disclaimed interest in the dredge prior to the trial.

The sole basis of the "complete ownership" claimed for the ladies is that at the family conference "it was decided to put the dredge in the wives' names."

The District Court has included in his supplemental findings some matters not requested by the order of the Circuit Court of Appeals—namely, the reasons or motives which actuated the four members of the Steinbach family, in family conference, to "put the dredge in the wives' names". The court finds these reasons to be (1) the unadjusted wartime contract and (2) the contract between the two Steinbach men and Captain Corgan for the future formation of a corporation to operate the dredge.

We pause to mention that the motives stated by the District Court are not fully correct. The Steinbachs all testified that the reason for the insurance in the names of the wives was the financial embarrassment of the Steinbach Iron Works. That in turn was consequent in part upon the unadjusted wartime contract.

As to the second motive, there was no provision in the contract between the two Steinbachs and Captain Corgan for the future formation of a corporation that the ladies should hold the dredge in the interim. By leaving the title to the dredge and the possession and control of the same in Captain Corgan, and by placing the insurance in the names of their wives, the Stein-

bach men made it appear to their creditors in Tillamook that they themselves had nothing to do with the dredge.

The Steinbach men and Captain Corgan caused to be prepared and executed a very fanciful document known in the record as Exhibit 15, but not printed. This is a sort of a Massachusetts Trust in which they all became trustees. Perhaps this had to do with the plan to create a corporation for the operation of the dredge. Both sides appear to agree tacitly that this Massachusetts Trust was inoperable or at least inoperative.

ASSIGNMENTS OF ERROR

The Court erred in its supplemental Findings of Fact in finding:

1. That Frances Steinbach and Carolyn Steinbach owned the dredge Wishram.

2. That the ownership of the dredge by Frances Steinbach and Carolyn Steinbach was complete subject to the working out of the unadjusted wartime contract of Steinbach Iron Works and the contract between the Steinbach brothers and Captain Hugh Corgan whereby each of the three was to have substantially a one-third interest in the dredge.

3. That the dredge was transferred to the ladies by and in the course of a family conference between the two Steinbach men and their wives wherein it was de-

cided to put the dredge in the wives' names.

4. That Captain Corgan understood that it had been decided in a conference in the Steinbach family to put the dredge in the wives' names.

INDEX OF MAIN POINTS OF LAW

1. Title to the dredge could be transferred only in writing. This title, the naked legal title at least, never left Captain Corgan. (Appellant's Main Brief 27; Appellant's Reply Brief 2, 3)

2. Neither a husband or a wife has any title to or interest in the other's personal property. (Appellant's Main Brief 43)

3. Appellees had no legally enforceable rights in or to the dredge. (Appellant's Reply Brief 5)

4. A policy issued to one who has no insurable interest is void. (Appellant's Main Brief 31-33)

5. The appellees are not the real parties in interest. The real parties in interest are the Steinbach men and Captain Corgan. (Appellant's Main Brief 50)

6. The appellant issued the policy to the ladies because of misrepresentation and failure to disclose their true relationship to the dredge. (Appellant's Main Brief 17, 23, 40 and 53)

7. Even if the appellant had known the facts about ownership when it issued the policy the policy would

still be void by statutory definition. (Appellant's Reply Brief 16)

8. If the appellees are deemed the owners and to have an insurable interest by reason of the family conference then the appellant has been misled into issuing a policy without reserving to itself the benefits of salvage covering a property in respect to which salvage is an inherent possibility. (Appellant's Main Brief 41-43; Appellant's Reply Brief 9-12)

THE FAMILY CONFERENCE

The District Court has held that the ladies owned the dredge and has based that ownership entirely on the conference between the four members of the Steinbach family and upon the added finding that Captain Corgan "fully understood" the same. We wish now to discuss the case from the point of view of the family conference and the extent of Captain Corgan's knowledge of it as bearing upon title and ownership of the dredge.

That the District Court also found the motives for holding the family conference, and found them not quite correctly, is not of present importance. The question is not *why* the Steinbachs held the conference, but whether the family conference could do what it is claimed for it, namely, transfer the title and ownership of the dredge to the ladies.

The record should contain no testimony whatever of the family conference. All of this testimony is in-

competent. Appellant duly objected to all of this evidence and the objection was overruled and became a continuing objection during the trial. Upon this appeal the point was reserved as the first assignment of error. Appellant has argued the inadmissability of this testimony to this court. (Appellant's Main Brief 20-22; 27-30. Appellant's Reply Brief 2-6)

But the family conference is in the record in spite of Appellant's objections and we will therefore discuss it, not waiving our exceptions.

First let us dispose of the asserted knowledge by Captain Corgan of the family conference. The District Court found "this was fully understood by Captain Corgan,"

John L. Steinbach testified (103; Appellant's Main Brief 22) that Captain Corgan did not attend the family conference and that the agreement by which it was claimed the ladies owned the dredge was entirely between the four members of the Steinbach family and without any writing. There is no testimony to contradict this. Neither Captain Corgan nor his son nor any of the four Steinbachs testified that any of the Steinbach told Captain Corgan, either before or after the family conference, anything about it. There is no testimony tending to refute the idea that Captain Corgan never heard of the family conference until Frances Steinbach first testified concerning it in Tillamook on June 17, 1946. There is no testimony that Captain Corgan knew at the time of the purchase of the dredge that Steinbach Iron Works was

in financial difficulties or that they owed money to the president of The First National Bank or to anybody else, nor is there any evidence that Captain Corgan then knew that Steinbach Iron Works had on its hands any uncompleted settlement with the government, or even that the Steinbachs had done wartime ship building.

Captain Corgan did know and participated in the contract with the two Steinbach men to the effect that the three would form a corporation to operate the dredge. Captain Corgan testified about this contract (Transcript 120). John L. Steinbach testified concerning the contract and also wrote a letter confirming it. (Appellant's Main Brief 9) This letter appears in full in the record. (Transcript 225) It was written contemporaneously with the purchase of the dredge,—after the first letter from the Government Engineers accepting Captain Corgan's offer, (Transcript 288) and before their second letter, which Captain Corgan described as a bill of sale "In the form of a letter addressed to me." (Appellant's Main Brief 10, and Reply Brief, 20)

If the ladies were to hold the title to the dredge from the time of its purchase until it could be transferred to a future corporation to be formed in accordance with the contract between the Steinbachs and Captain Corgan, then Captain Corgan certainly ought to know about it. *It is quite significant however that neither J. L. Steinbach's letter confirming*

the contract nor any of the testimony concerning it makes any mention of the ladies.

So much for Captain Corgan's understanding of the internal arrangements of the Steinbach family. There is no testimony that he had any such understanding whatever.

Let us now trace the family conference testimony from beginning to end and see what it consists of. The supplemental findings require such a tracing, and give to the Tillamook depositions of June 17, 1946 (Exhibit 7) an importance which they did not quite have in this appeal prior to the supplemental findings. These depositions together with the exhibits thereto were marked at pre-trial as defendant's Exhibit 7. (Transcript 77) At the trial, after the opening statements had been made, Mr. Phillips of counsel for plaintiffs offered all of the pre-trial exhibits in evidence. The proceedings at that point were as follows: (Transcript 75)

"Mr. Phillips: I might suggest to your Honor that there has been a pre-trial and all of the exhibits are already in. I suggest that we offer them at one time and *that either party may use them as they see fit*, if there is no objection. (Emphasis ours)

Mr. Snow: No objection.

The Court: During the recess, the Court Reporter will give those additional exhibits numbers to follow the numbers already issued, and all exhibits will be considered offered and admitted as trial exhibits, taking the same numbers as the pre-trial exhibits, subject to any objections that

might have been stated at the pre-trial and any further objections that may be stated at any time in this trial.

Mr. Snow: I wish to reserve for the record objection to certain testimony adduced on cross examination of these witnesses, which would tend to show parol transfer of the Wishram to the ladies, and I wish to reserve in the record an objection to any and all testimony tending to show transfer of the dredge in any other manner than as required by the statutes of Oregon.

The Court: It is so understood.

Mr. Phillips: As I understand, the exhibits are all in evidence and will be marked as numbered in the pre-trial.

The Court: Yes."

The foregoing quotations are offered because the District Court at the time of the supplemental hearing on June 10, 1948, said that the depositions might be considered in evidence only for the purpose of use at the trial to read into the record admissions against interest, and for impeachment. (Supplemental Proceedings 25-28). No such reservation was made however when the exhibits were offered and we think the depositions of the Appellees at least are in evidence for all purposes. (Federal Rules of Civil Procedure, Rule 26 (d) (2)) In fact where a deposition taken in the early stages of the case is admitted in evidence, an attorney might be somewhat lulled into security by that fact, in regard to the full use of the deposition for impeachment purposes.

We have printed as an appendix to this brief from Exhibit 7 the cross examination of Frances Steinbach

and the full testimony of Carolyn Steinbach, who did not testify at the trial. John L. Steinbach's testimony in his deposition did not vary from that at the trial.

The earliest mention of the family conference occurred at the cross examination of Frances Steinbach conducted by Mr. Winslow, her own counsel, at the Tillamook depositions of June 17, 1946. These depositions commenced in the morning and continued until 12:20 p.m. when a recess was taken until 1:30 p.m. (Exhibit 7, 70) Frances Steinbach was examined in the morning. At the conclusion of her direct examination she was cross examined by Mr. Winslow. He led her freely, thus weakening her testimony somewhat from her point of view. Under his lead she acquiesced that there had been a family conference about the dredge and continued (Exhibit 7, 43; this Brief 24):

"Q. Just tell how that was arranged, who was to own the dredge and how that came about?

A. That we were to own some of it—

Q. Tell who was going to own the dredge, how it was handled and so on, and then after you give your answer, just explain what led up to it."

MR. WINSLOW: Q. Just go ahead and tell us who among you four it was agreed was to own the dredge, and then go ahead and tell the reason why.

A. We were all to own it; we were all to own it together, and we were going to keep it out of the shop, because the shop was sort of involved in these boats that they had been building."

The testimony that "we were to own some of it"

and "we were all to own it together" does not support the idea that the two ladies were to own the dredge.

Carolyn Steinbach also testified in the morning. On her direct examination (Exhibit 7, 49 this Brief 29) she testified that she contributed no money toward the purchase of the dredge, received no papers or documents, no promissory notes or mortgage nor shares of stock, that she took part in family talks, that she had no financial interest in the dredge and no ownership of the same, "just through my husband", that when the check for return premium came she endorsed it to Frances Steinbach because of the loan the latter had made to the two men; that she, Carolyn Steinbach, did not lend any money to anybody. On cross examination, she said "yes" to Mr. Winslow's statement that as between the four Steinbachs she knew the dredge was being purchased in the names of the ladies and that the insurance was being taken out in the names of the ladies. (Exhibit 7, 49; This Brief 31)

In our main Brief we quoted the substance of the testimony at the trial concerning the family conference (Appellant's Main Brief 20-22)

Prior to the taking of the Tillamook depositions appellant took the deposition of Captain Corgan at Portland on May 29, 1946. This was some six months after the loss and two months after commencement of the suit yet even then Captain Corgan did not claim that the ladies owned the dredge, but spoke of the insurance policy as security for a loan. (Appellant's Reply Brief 4, 21)

The conclusions which we draw from the above testimony is that even if we consider the family conference testimony to be competent and properly in the record, which we do not, the whole testimony concerning that conference fails to support the idea that the ladies were to own the dredge. Also it is quite interesting to note how that idea of ownership through the family conference crystalized and developed as time went on.

Furthermore, we need hardly remind this Court that there is no testimony in connection with the family conference or elsewhere in the record that the ladies or either of them paid any consideration whatever for the dredge. Lack of written transfer by Captain Corgan, lack of consideration, lack of delivery or possession of the dredge, lack even of knowledge by Captain Corgan of the family conference,—all of these things denied the two women any rights in the dredge which they could have enforced in a court of law or equity.

As a matter of law the ladies could have acquired no insurable interest or title in the dredge based upon the family conference even if we consider the testimony of the family conference competent and properly in the record.

SUPPLEMENTAL PROCEEDINGS IN THE DISTRICT COURT

It is of interest to follow the course of the hearings before the District Court, especially that of June 10, 1948, because the remarks of the Court fortify the supplemental findings as by an opinion. This transcript is now before the Circuit Court of Appeals.

At pages 32 and 33 of the Supplemental Transcript we discussed the letter from J. L. Steinbach to Captain Corgan (Transcript 225) in which the plans for future business of the dredge was outlined, and pointed out that the women were not mentioned in the letter. The Court (Supplemental Transcript 33) abruptly brought the argument around to the conference in Mr. Knapp's office between J. L. Steinbach, Captain Corgan and Mr. Knapp leading to the issuance of the policy. (Appellant's main Brief 17, 23, 40 and 53)

It seemed to us that the District Court entertained the belief that the appellant might waive the requirement of insurable interest. Consequently we denied that the insurance company had such a right and on page 34 stated the facts of the Michigan case, *Agricultural Insurance Co vs. Montague*, 38 Mich 548 (Reply Brief 16). Before we could read from the opinion, the District Court interrupted at the top of page 35 indicating by inference that he did not agree with that authority.

At the bottom of page 35 the Court questioned the statement of the writer that Mr. Knapp testified that he was told by Mr. Steinbach and Captain Corgan that the ladies had purchased the dredge with the money of the ladies. (Appellant's Main Brief 17) On page 36, the Court suggested that Mr. Knapp may have referred to the money of the men.

Mr. Knapp clearly referred to the money of the women. In answer to the previous question, he testified that neither Mr. Steinbach or Captain Corgan told him that the Steinbach Iron Works had paid the money for the dredge. He would not in one breath say that he was not told that the men furnished the money for the dredge, and in the next breath say he was told that it was purchased with the men's money. (Transcript 198)

At page 39 of the Supplemental Transcript we got around to the argument that if the court held the women to be the owners of the dredge the appellant would be placed in the position of attempting to contract away its benefit of salvage in a case where there was possibility of salvage, contrary to the statute Section 101-1119, (Appellant's Main Brief 73). We argued that the appellant could not recover from the Bergs as owners of the fishboat which attempted the towage, in subrogation to the right of the appellees, because it could not be shown in an independent suit against the Bergs that the appellees owned the dredge or suffered any damage by reason of the loss of the dredge. The Court stated that he would hold the

same as regards ownership in the secondary case against the Bergs as in the primary case. We answered that it would be impossible to show that the appellees suffered any damage by the loss of the dredge. The Court then pointed out that Captain Corgan suffered nothing with the loss of the dredge. We agreed with this proposition, probably too readily. It may be that Captain Corgan would have lost the difference between the amount the Steinbach men had in the dredge,—\$9,446.26 (Transcript 222; Appellant's main Brief 25) and the amount of the recovery \$11,437.50, or perhaps one third of that difference.

At this point the minds of the Court and of arguing counsel were brought pretty closely together on the ultimate financial side of the case. Captain Corgan who held the paper title to and possession of the dredge, had no money in it. The dredge was insured in the names of the ladies, who had nothing in it. The Steinbach men however had in the dredge \$5500 of purchase price, some insurance premiums, wages to Captain Corgan and his son, and repairs, to the full total of \$9446.26. (Appellant's Main Brief 24-26) The Steinbach men however had no conveyance in their names, and never took delivery or had possession of the dredge.

Mr. Steinbach and Captain Corgan, by misleading Mr. Knapp and failing to tell him the whole story, had secured issuance of a policy in the name of the women. The creditors of the Steinbach Iron Works were hindered and delayed because, while the Stein-

bach Iron Works paid out all the money, title and possession of the dredge were in Captain Corgan, and the policy in the names of the ladies. There was no doubt that recovery in this suit would go primarily to the Steinbach men. John L. Steinbach admitted this in testifying as to the amount of insurance to be placed on the dredge, when he said (Appellant's main Brief 20):

"I was interested in just the insurance being enough to cover, to protect us for the amount that we had paid for it."

At this stage of the argument, at the bottom of page 42 of the Supplemental Transcript the Court suddenly announced what we believe to be his entire philosophy of the case both as to the facts and as to the law. We quote:

"THE COURT: Okeh. I think when a man pays his money for insurance, if he wants title to his property in his wife, even though he has paid every dollar of it and his wife has paid nothing whatsoever, he is entitled to collect. That is what I think, and that is what I think the law is."

This, to us, is a naked statement of the Court's views, stripped of all trial strategy and reduced to essential facts and legal beliefs.

On the factual side there is no pretense here that the ladies had any rights of ownership in the dredge. The Court recognized that the Steinbach men paid all the money and considered them to be the sub-

stantial owners of the dredge, and the real assureds under the policy.

On the legal side there is an expression of the Court's conviction that a man owning property can cause a policy of insurance on the same to issue in the name of his wife, and that upon loss the wife can recover, with the expectation that she will pay the recovery over to her husband.

We think we have correctly analyzed the District Court's point of view, and we say respectfully but firmly that his opinion on the law disregards the Oregon statutes and all the law we have found in the books.

If the Court's statement is the law let us look for a moment to see what it leads to.

If a man can insure his own vessel in his wife's name the prohibition against wagering policies goes overboard. The District Court has put his own concept of what is right above the governing statute. Wagering policies, where the insured had no insurable interest, were entirely lawful prior to the year 1751, but they have been condemned for the last 200 years. Surely, if wagering policies were beneficial in the promotion and encouragement of navigation and commerce and the legitimate conduct of the same, the old statute outlawing them would have been repealed long ago, and would not have been written into the English law of 1906 or Oregon law of 1921.

The District Court's view of the law deprives the insurance company of its possibility of salvage. Where

a vessel owned by a man is insured in the name of his wife, she cannot surrender the salvage where a total loss is claimed, or give in subrogation an effective right of action against a wrongdoer who may have caused the loss; nor can the husband be compelled to surrender, nor can the company sue in his right or name. It is unlawful for an insurance company to write, or for an assured to receive, an insurance policy without benefit of salvage to the company, where salvage is possible. This statute is recognized by assureds and insurers alike. Premium rates and re-insurance covers and treaties are based in part upon the possibility of salvage which inheres in the various risks.

The District Court holds not only that a man can insure his own vessel in his wife's name, but that he is under no duty to tell the agent of the company the truth about the ownership of the vessel. His statement to the company that his wife owns the vessel is ignored as an immaterial misrepresentation. Thus the statute condemning misrepresentation to insurers and requiring full disclosure to them is to be disregarded. Insurance companies are to be required at their peril to investigate titles before they insure. They are to be at the mercy of falsifiers. Again the District Court has placed his own views above the statute.

Under the Court's ruling a man can, in order to defraud his creditors, place the naked legal title to and the possession of his vessel in a friend, and the

insurance in his wife, and thus make it appear that he is not interested in the vessel. It is perfectly proper, according to the District Court, for him to represent to the insurance company that the wife owns the vessel, without disclosing the true interests of the friend, or the wife, or himself.

Again, in allowing a wife to recover on an insurance policy covering property of the husband, the expectation is of course that she will deliver over the recovery to the husband. Such a result derogates from the rule requiring an action to be prosecuted in the name of the real party in interest.

These considerations will, we think, be a powerful deterrent to acceptance by this Court of the District Court's theory.

CONCLUSION

In conclusion we ask the Circuit Court of Appeals to hold that appellees had no insurable interest in the dredge and that the policy sued on is, therefore, void.

Respectfully submitted,

MACCORMAC SNOW,

Attorney for Appellant

APPENDIX

Cross examination of Frances Steinbach and complete testimony of Carolyn Steinbach. Parts of Exhibit 7, depositions taken at Tillamook, Oregon, June 17, 1946. Figures in brackets denote pages of Exhibit.

FRANCES STEINBACH, CROSS EXAMINATION
[42] BY MR. WINSLOW:

Q. At the time of or just prior to the purchase of this dredge, was it talked over among your family, I mean Mr. Steinbach, John, your husband, and Dave and his wife? Did you all know about these negotiations for the purchase of the dredge?

A. As far as I know, we all did.

Q. Did you talk it over?

[43] A. Yes, surely, we talked it over.

Q. I want you just to testify now as to what was the talk there, as to who was going to own the dredge and the reasons why it was handled in just the way it was handled.

A. Yes.

Q. Just tell how that was arranged, who was to own the dredge and how that came about?

A. That we were to own some of it—

Q. Tell who was going to own the dredge, how it was handled and so on, and then after you give your answer just explain what led up to it.

MR. SNOW: I think I will interpose an objection to that. That would be hearsay. I will just note an objection on the ground of hearsay.

MR. WINSLOW: Yes. Let me withdraw that question for the time being.

Q. Did anybody else contribute anything towards the purchase of the dredge besides the four Steinbachs, Dave and his wife, you and John? Did anybody else contribute anything towards the purchase of the dredge?

A. Not that I know of.

Q. Did you folks contribute all of it, then?

A. Yes.

Q. What was the agreement between you four about paying for the dredge, as to who was to own the dredge? Just testify as [44] to what was discussed as to the reasons why you were handling it the way you did.

MR. SNOW: Was that agreement reduced to writing?

A. No, it was not.

MR. SNOW: Just in a family conference?

A. Yes, just family affairs.

MR. SNOW: I desire to note an objection to that on the record.

MR. WINSLOW: Q. Just go ahead and tell us who among you four it was agreed was to own the dredge, and then go ahead and tell the reason why.

A. We were all to own it; we were all to own it together, and we were going to keep it out of the shop, because the shop was sort of involved in these boats that they had been building.

Q. What boats?

A. Boats for the Maritime Commission.

Q. This record does not show anything about the boats. Just go ahead and explain that.

A. They had not received their money yet, so we wanted to have something when the boys came back from service they could go into business and have something that we felt they could be sure of.

Q. What was the discussion as to why you wanted to keep it out of the shop?

MR. SNOW: I understand I have a continuing objection to all [45] of this line of testimony?

MR. WINSLOW: All right.

MR. SNOW: On the same ground; it is hearsay, incompetent, irrelevant and immaterial.

MR. WINSLOW: Q. What shop?

A. The Steinbach Iron Works shop.

Q. What was the discussion as to why you wanted to keep it out of the shop?

A. Because the shop owed quite a lot of money to the First National Bank and owed bills for things they had bought for these boats. They were pretty heavily involved, and we wanted to get something that we felt the boys could have.

Q. You wanted to keep the dredge out of the shop, then?

A. Yes, wanted to keep the dredge out of the shop.

Q. You spoke about the boys. You have some boys in the service?

A. Yes, Dave has two boys in the service and we had one boy in the service.

Q. What was the discussion among you Steinbachs that you have mentioned as to why you wanted to have something for the boys?

A. Well, when they came home from the service. We knew they did not care for the shop so much, and we thought maybe they would like the dredge business better. They always seemed to like boats and things like that, and we thought they would like that better.

[46] Q. As a matter of fact, they did not like the shop at all, did they?

A. No.

Q. John and Dave were partners conducting the shop, the Steinbach Iron Works?

A. Yes.

Q. Then, you say it was for that reason and for the reason you have given, about them being somewhat involved in building these boats, that you wanted to keep the dredge out of the shop business?

A. Yes, we wanted it entirely separated.

Q. The insurance was taken out in the name of you ladies, was it?

MR. SNOW: The same objection.

A. Because—shall I go on?

MR. WINSLOW: Q. Yes, surely.

A. Because we wanted to keep them separated from the shop.

Q. Then, was the dredge considered in the names of you ladies to keep it out of the shop?

A. Yes, it was.

Q. That was the understanding between all four of you?

A. Yes.

Q. It was understood between all four of you all the time that the dredge was in the names of you ladies?

[A] A. Yes, sir.

Q. So, then, it is a fact, as far as you four were concerned, you four had contributed all of the money for the purchase of the dredge, that title to the dredge was to be in Mrs. Dave Steinbach and yourself and the insurance was taken out in your names on that basis?

MR. SNOW: I object to that as leading.

MR. WINSLOW: Leading?

MR. SNOW: Let her tell.

MR. WINSLOW: Don't I have a right to cross examine?

MR. SNOW: There has been nothing brought out about that. She is your own witness.

MR. WINSLOW: No, Mr. Snow. She is your witness. You are taking her deposition.

MR. SNOW: I just want to note an objection in the record. Let her answer, subject to the objection.

(Question read.)

A. Yes.

MR. WINSLOW: Q. That was all understood between you four?

A. Yes.

Q. There may be one or two other things. This promissory note we are talking about here, you did

not give me that, did you?

A. I imagine Dave or John possibly gave it to you with some other papers.

MR. WINSLOW: That will be all.

CAROLYN STEINBACH, DIRECT EXAMINATION
[49] BY MR. SNOW:

Q. You are Carolyn S. Steinbach, are you?

A. Yes.

Q. One of the plaintiffs in this case?

A. Yes.

Q. You have recently been ill, have you?

A. Yes, I have.

Q. We will make this just as brief as possible. Did you contribute any money towards the purchase of the dredge?

A. No, I didn't.

Q. Did you receive any papers or documents having to do with the dredge?

A. No, sir.

Q. No promissory note was given to you?

A. No.

Q. Nor mortgage?

A. No.

Q. No shares of stock or other evidence of interest in the Coast Dredging & Construction, Ltd.?

[50] A. No.

Q. You participated, did you, in the family talks about the dredge?

A. Yes, sir.

Q. You are the wife of Mr. Dave Steinbach?

A. Yes.

Q. Outside of that, do you know anything more about this aside from the talks you have had from time to time?

A. No, sir.

Q. You did not have any financial interest in it at all, did you?

A. No, I didn't.

Q. You did not have any ownership of the dredge, yourself, did you?

A. Just through my husband.

Q. Just through the talks that you had in the family?

A. Yes.

Q. When this check came in from the insurance company, payable to you and Mrs. John Steinbach, you endorsed it all over to her, did you?

A. Yes, sir.

Q. Because she had put up the money?

A. Yes, sir.

Q. And you had not, is that right?

A. That is right, yes, sir.

[51] Q. So, you did not lend any money to your husband on this dredge deal at all, did you?

A. No.

Q. Or to anybody else?

A. No.

MR. SNOW: I think that is all, Mrs. Steinbach.

CROSS EXAMINATION

[51] BY MR. WINSLOW:

Q. You knew from the talks in the family at the time the dredge was purchased that the dredge was being placed in the names of you ladies, that is, as between you four, did you not? You knew it was being purchased in the names of the ladies and that the insurance was taken out in the names of the ladies?

MR. SNOW: The same objection to that as heretofore made.

A. Yes.

MR. WINSLOW: That is all.

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation.

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

GEORGE P. WINSLOW,
Tillamook, Oregon,

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FILED

AUG 9 - 1948

PAUL P. O'BRIEN,

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In the United States
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APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE

By order of the Circuit Court of Appeals, filed May 17, 1948, in this cause, the trial court was required to make three findings: (1) Whether plaintiffs or either of them owned the dredge Wishram or any interest therein; (2) The nature, character and extent of such ownership or interest, if any; and (3) How, when and from whom such ownership or interest, if any, was acquired.

In compliance with this order, the trial court made

its supplemental findings of fact, which were filed in the Circuit Court of Appeals on or about June 24, 1948. A portion of these supplemental findings appear on page 3 of the Appellant's Brief on Supplemental Findings of Fact. The omitted language reads as follows:

"Competitive bids for the Dredge Wishram had not been satisfactory, and the United States Engineers asked the Steinbach brothers to submit a private bid, which they did through Captain Hugh Corgan. The Steinbach brothers furnished Captain Corgan with the purchase price, \$5500.00, part of which they took out of their business, part they borrowed from the bank, and part they borrowed from Francis Steinbach, one of the wives. Captain Corgan received a paper from the Engineers, reading as follows:

'(Letterhead, War Department, Office of the
District Engineer)

6 June 1945.

Captain Hugh Corgan,
2944 N. E. 68th Street,
Portland, Oregon.

Dear Sir:

'Receipt is acknowledged of your certified checks for \$1,000 and \$4,500, full payment for the Dredge 'Wishram' and equipment at the Kruse & Banks Shipyard, North Bend, Oregon.

'Upon presentation of a copy of this letter to the Resident Engineer, U. S. Engineer Office, Empire, Oregon, he will deliver to you or your authorized representative, the property comprising the sale.

Very truly yours,

/s/ HORACE H. PERSON,
Captain, Corps of Engineers,
Executive Officer.'

"This paper Captain Corgan turned over to John Steinbach at once."

The above language was included in the finding by reason of requirement number (3) in the order of May 17, 1948, namely: "how, when and from whom such ownership or interest, if any, was acquired."

Requirements (1) and (2) of the order are satisfied by the final language of the finding, which reads:

"The ownership of the Dredge by Francis and Carolyn Steinbach was complete, subject to working out of the plans aforesaid, and this was fully understood by Captain Corgan, as well as the Steinbach brothers and their wives."

Appellant properly states (page 4, Appellant's Brief): "There is no finding that they had any interest in the Dredge other than ownership."

Concerning the nature, character and extent of the ownership, the trial court held that the ownership was complete in Francis and Carolyn Steinbach. Complete means full and exclusive. Therefore, it must be concluded that Francis and Carolyn Steinbach owned the Dredge themselves with no other person joining, at least, during the time specified in the complaint.

Appellant complains (page 5, Appellant's Brief): "This finding does not recite whether the women held the dredge in common, jointly or otherwise." However, counsel had previously answered his own criticism in Appellant's Brief filed in the Circuit Court of Appeals in March, 1948, by stating on page 45 thereof, "In Oregon there is no joint tenancy of personal property. Dual

or multiple tenancy in personal property is in common.” Therefore, we will concede with counsel that the finding must mean ownership in common, and that joint ownership, could not be legally involved. This criticism, however, we do not feel merits any particular attention.

We find it difficult to follow counsel’s reasoning in the following language appearing on page 54 of Appellant’s Brief:

“ ‘Prior to the purchase of the Dredge, the Steinbachs and their wives conferred about the advisability of making the purchase and operating the Dredge, and it was decided to put the Dredge in the wives’ names, * * * ’

“The District Court also adds in the last paragraph:

“ ‘this was fully understood by Captain Corgan, * * * ’ ”

Counsel seems to believe that this amounted to a finding that Captain Corgan knew about the family conference, as he states:

“There was no evidence that Captain Corgan, knew anything about the family conference, as we will point out later.”

Counsel does comment on the family conference and Captain Corgan’s knowledge of the same on page 9, etc. of Appellant’s Brief. We do not regard Captain Corgan’s knowledge or lack of knowledge of the family conference an important consideration in the proceedings. In the interest of accuracy, however, we feel it is necessary to call this Court’s attention to the fact that

the trial court made no finding to the effect that Captain Corgan knew about the family conference..

The concern of counsel for the Appellant over Captain Corgan's knowledge of the family conference is apparently based upon a misunderstanding of the effect of the final language in the finding of the trial court, namely:

“The ownership of the Dredge by Francis and Carolyn Steinbach was complete, subject to the working out of the plans aforesaid, and this was fully understood by Captain Corgan, as well as the Steinbach brothers and their wives.”

The effect of this language is that what Captain Corgan “fully understood” was that Francis and Carolyn Steinbach had complete ownership of the dredge. Even though the rules of grammar require a conclusion that the clause: “subject to the working out of the plans aforesaid” was part of Captain Corgan's understanding, this language falls considerably short of a finding that he knew anything about the family conference at which the plans were discussed.

Accordingly, we challenge the statement of counsel for Appellant appearing on page 10 of Appellant's Brief, wherein it is stated:

“First let us dispose of the asserted knowledge by Captain Corgan of the family conference. The District Court found ‘this was fully understood by Captain Corgan,’ ”.

Since there was no such finding by the trial court, we find it unnecessary to reply to such portions of the Ap-

pellant's Brief which are based on that erroneous assumption.

Likewise, the statement in Appellant's Brief, on page 10:

"There was no evidence that Captain Corgan knew at the time of the purchase of the dredge that Steinbach Iron Works was in financial difficulties or that they owed money to the president of the First National Bank * * * "

is incorrect. Captain Corgan testified:

"Q. Did Mr. Steinbach say anything more to Mr. Knapp as to why the policy was being issued in the names of the ladies?

"A. Yes, he did. In regard to the condition of the Steinbach Iron Works at that time, he said he did not want it connected in any way with the Iron Works." (Tr. 123).

ASSIGNMENT OF ERROR NO. I

The trial court did not err in finding that Frances Steinbach and Carolyn Steinbach owned the dredge "Wishram." The relevant evidence on this question is as follows:

"Q. Now, at the time the Dredge Wishram was purchased from the Government, or prior to that time, did the Steinbach family have any discussion as to how the title to the Wishram should be taken and held? A. They did.

"Q. Just tell the Court what discussion they had.

"Mr. Snow: If your Honor please, may I have a continuing objection and exception to all testimony of this character tending to show title by parole?

"The Court: It is so understood. Proceed.

"A. Shall I go on?

"Q. (By Mr. Winslow): Go ahead, please.

"A. We met at Dave Steinbach's house, John my husband John, Dave and Carolyn, and we planned on buying this dredge, the Wishram. We talked it over for quite a while and then we decided that Carolyn and myself should have the Wishram, and it was done for convenience.

"The shop had been in the names of John and Dave for years, and we never had had a real good living out of the shop and, so, we thought maybe we could get into something else—if we could get into something else we would have a little bit, maybe we could make a little bit more money that we had in the shop. Not only that, but Dave Steinbach had two boys in the service.

"Q. This was all talked over in the family conference?
A. Oh, yes.

"Q. Go ahead.

"A. We had a boy in the service, too, and we thought we could put this in our names, in the women's names, and then, after it got into working order of some sort, then we would probably turn it over to the boys, or some other affair, but it was not done—it was not to be done until after everything was paid off and was in working order.

"Q. Then, will you say all four of you agreed then to that plan?
A. We did.

"Q. Was that plan ever changed?

"A. Never.

"Q. Have you ladies ever transferred, orally or otherwise, any interest in the Wishram?

"A. Never." (Tr. 175, 176 and 177).

David E. Steinbach testified:

"A. At the time of the purchase of the dredge, my brother, his wife and my wife, we met at our house and talked about what we were going to do when we purchased this dredge here to keep it out of the shop. On account of the financial difficulties there that we had with the Maritime Commission, we did not want to get it mixed up with the shop account, so we had put the insurance in the ladies' names to keep it away from the Iron Works.

"Q. Go ahead and tell what was said.

"Q. (By Mr. Winslow): Go ahead and tell what was said about whether the boat was to be purchased and held by the ladies or not?

"A. I didn't quite get that.

"Q. Tell what was said. What do you mean by keeping it out of the shop?

"A. Well, like I said here a few minutes ago, we were so involved financially with the Maritime Commission and we did not know just how that was going to turn out one way or another, just how long we would have to wait for our money, and we also had loans from two private men there in Tillamook. One happened to be the President of the First National Bank. Like my brother said, every time he went in the First National Bank he wanted to know how soon we were going to pay him back. So, what we did, we thought that would be the best way, if we were going to purchase this dredge, to keep it out of the account of the Steinbach Iron Works account.

"Q. Then what did you agree to do about the ownership of the Dredge?

"A. Well, we agreed to put it in the ladies' names.

“Q. Has that agreement ever changed in any way?

“A. No, it never has.” (Tr. 119-120).

John Steinbach testified:

“A. Shortly after the bids were opened, we received a letter from the Army Engineers asking us to offer a private bid. Previous to this, we had made a tentative agreement on the matter, in case we did purchase a dredge, so, after we received this letter from the Army Engineers, requesting us to make a private bid, my wife and I came up to Portland and met with Mr. Corgan at his home, and he expressed regret that we had not gone ahead with it, for several reasons. He wanted to get back in the dredging business and also make a place for his son who was coming out of the service.

“Going home that night, we talked it over in the car and my wife said, ‘John, I like the idea of Corgan—like the idea that Corgan has of making this business available for his son,’ and we had a son in the service and my brother had two. She said, ‘If you haven’t enough money—if you and Dave cannot raise enough money between you, I have some money that I have saved from teaching and I will loan you some.’

“Q. Was your wife teaching school then?

“A. Well, yes, she was teaching. She was a teacher when we were married and when our oldest son started to college she went back to teaching school.

“We had not received our settlement from the Maritime Commission. They held us up for two years and two months before we got a final settlement, so we owed some bills on these boats and, in order to avoid any complications, we agreed among ourselves—we did not put it in

writing—that we would take on this dredge and the insurance and any other papers would be made out in the wives' names and be held that way until such time as we had our dredging company organized and had it in operation." (Tr. 86-87).

As a result of this family conference, Captain Corgan was authorized to make a bid for the dredge on behalf of the Steinbachs:

"Q. How long have you known the Steinbachs, just generally?

"A. Oh, I would say almost thirty years. I was at first at Yaquina. That was my first connection. That was about 1912.

"Q. What did you have to do with the purchase of the Dredge Wishram in 1945?

"A. I purchased her as agent for the Steinbachs.

"Q. Did you have any financial interest in the purchase at all? A. I had not ten cents.

"Q. Do you claim any financial interest in the dredge now? A. I do not.

"Q. Briefly, tell the Court how the purchase of this dredge, the Wishram, was handled by you?

"A. Well, Mr. John Steinbach came to me first, knowing that I was an experienced dredge man, and he put a proposition up to me, asking me if I would be interested as a member of a company, providing he would give me a working interest in it until that part of it was paid and then I would become an owner.

"Q. All of it? A. A third.

"A. A third? A. Yes.

"Q. That wasn't quite an answer to my ques-

tion. How was it intended between you and the Government——

“A. Well, I had been with the Government for a number of years and, knowing dredges, he asked me if I would handle the purchase of the dredge.

“Q. Tell what you did in the matter of the purchase of the dredge from the Government?

“A. I went and got the data from the Government Engineers.

“Q. Yes; go ahead.

“A. Then I bought the dredge in—bid the dredge in with the Steinbachs' money and immediately handed over the letter that the Government gave—the Government does not give a deed to any of that property when you bid. They simply give you so many days to get the property away from the mooring, or wherever it is located.” (Tr. 119-120).

ASSIGNMENT OF ERROR NO. II.

The trial court did not err in finding that Frances and Carolyn Steinbach had complete ownership subject to the working out of the unadjusted wartime contract of the Steinbach Iron Works and the contract between the Steinbach brothers and Captain Corgan. Captain Corgan testified:

“A. Well, Mr. John Steinbach came to me first, knowing that I was an experienced dredge man and he put a proposition up to me asking me if I would be interested as a member of a company, providing he would give me a working interest in it until that part of it was paid and then I would become an owner.

“Q. All of it? A. A third.” (Tr. 120).

John L. Steinbach testified:

"A. * * * In 1943 we had a contract with the United States Maritime Commission to build three 65-foot tugs which were delivered to the British Government, and we did general boat repair. We are right on the waterfront and have been doing general boat repair for years.

* * * * *

"Q. * * * In the year 1945 just briefly tell the Court whether or not you were notified the Wishram was being offered for sale?

"A. Yes, we received an invitation to bid on her in 1945.

"Q. At that time what was your relationship with Captain Hugh Corgan?

"A. Well, we had known Mr. Corgan for many years, had business dealings with him, and we contacted him at the time we contemplated making a bid on this dredge, and we entered into a tentative agreement between my brother and Corgan and myself that if the dredge was purchased we would form a company, a dredge company, and engage in the dredge business, and each to have a one-third interest. Mr. Corgan was not able to advance any of the money, but he would take a working interest and pay it out as the dredge paid out." (Tr. 82 and 83).

He further testified:

"We had not received our settlement from the Maritime Commission. They held us up for two years and two months before we got a final settlement, so we owed some bills on these boats and, in order to avoid any complications, we agreed among ourselves—we did not put it in writ-

ing—that we would take on this dredge and the insurance and any other papers would be made out in the wives' names and be held that way until such time as we had our dredging company organized and had it in operation." (Tr. 87).

He further testified:

"Q. When you were in Portland, discussing with Mr. Knapp about the policy, and when you told him to issue the policy in the names of your wives, your wife and David's wife, you did that, knowing that if there was a loss, none of that insurance money would go to the Steinbach Iron Works, didn't you?

"A. Absolutely; didn't want to get mixed up with creditors on this shipbuilding deal.

"Q. Talk louder.

"A. When we got through with the shipbuilding deal, we had \$29,000 coming from the Maritime Commission and we owed \$16,000. These creditors waited twenty-seven months before we could pay them. There was nothing coming there to protect the creditors." (Tr. 100-101).

He further testified:

"A. Well, we tried to carry out the purposes of what we had started out to do when we bought that dredge. We intended to organize a dredging company with Dave Steinbach, Hugh Corgan and myself, to take over this dredge and operate it and, as the dredge earned money, the money that was advanced by the wife would be paid back, and then the dredge would become our property and each one of us would have a one-third interest." (Tr. 105).

The evidence above quoted, together with other evidence in the case, amply supports the finding of the

trial court that the Appellees had complete ownership of the dredge, subject to the working out of the unadjusted wartime contract of the Steinbach Iron Works and the contract between the Steinbach brothers and Hugh Corgan. The assignment of error, therefore, is without merit.

ASSIGNMENT OF ERROR NO. III.

The trial court did nor err in finding that the dredge was transferred to the ladies as a result of the family conference between them and their husbands. On this question, John Steinbach testified:

“Q. The only basis upon which you make any claim that these two ladies owned the dredge was the family conference among members of the Steinbach family? A. That is right.

“Q. Is that right? A. That is right.

“Q. Did Captain Corgan attend this conference?

“A. No.

“Q. The answer is no? A. Yes.

“Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?

“A. That is right.” (Tr. 103).

His testimony is confirmed by that of David E. Steinbach (see Tr. 112-113), and by that of Frances Steinbach (see Tr. 175-177); therefore, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. IV.

By this assignment, the erroneous contention is made that the trial court erred in finding that Captain Corgan understood that it had been decided in a conference by the Steinbach family to put the dredge in the wives' names. Since no such finding was made, this assignment is erroneous and misleading. But even though the trial court did not actually find that Captain Corgan knew about the family conference, the evidence does strongly indicate that he had learned what transpired among the Steinbachs. For example, he testified:

"Q. (By Mr. Winslow): You were present when Mr. Steinbach told him to write the insurance in the ladies' names?

"A. Absolutely." (Tr. 125).

He also testified:

"Q. Did you then tell Knapp that the ladies had bought the dredge from the Government?

"A. Mr. Steinbach had this letter from the Government in his pocket and it was Mr. Steinbach who told Mr. Knapp to make the policy out in the ladies' names owing to the fact that he did not want it to be connected with the Iron Works.

"Q. Do you recall definitely now that Mr. Steinbach said anything about connecting the dredge with the Iron Works in Mr. Knapp's office?

"A. Yes.

"Q. He had told you that previously, that he didn't want it connected with the Iron Works, hadn't he?

"A. Oh, yes.

“Q. And you think that he also said, when he was in Mr. Knapp’s office, that he did not want it connected with the Iron Works?

“A. He told Knapp to make the policy out to the ladies.

“Q. That it all he told him?

“A. No, it wasn’t. He told Knapp at that time his reasons.

“Q. And his reason was that he did not want it connected with the Iron Works?

“A. Yes, and that they had advanced the money.” (Tr. 136-137).

Under the title “Index of Main Points of Law, (page 8, Appellant’s Brief, on Supplementary Findings of Fact), eight points previously discussed in Appellants’ main Brief and Reply Brief have been listed. The purpose of including these points is not immediately apparent. However, it gives us the opportunity to comment on an apparent inconsistency in the Appellant’s position appearing at page 5 Appellant’s Reply Brief. There the statement appears:

“The Appellees on page 19 of their Brief argue that the ‘defense’ of the Statute of Frauds is not available to the Appellant. Appellant does not set up the Oregon Statute requiring writing in order to effect transfer of the dredge as a ‘defense.’ The Oregon statute is only one of many reasons why the Appellees did not own the dredge.”

If the Appellant does not in fact rely on the Oregon Statute (Section 2-907, O. C. L. A.) as a defense, it would be interesting to know how it seeks to apply

the Statute in the present controversy. They do state in capitalized print at the top of page 5 of their Reply Brief, "Appellees had no legally enforceable rights in the dredge." We take this to mean that because of the terms of the Statute the Appellees had no right to sue. It makes no difference in the final analysis whether the Statute is invoked because the plaintiff has no cause of action, or otherwise. Called by any other name it still remains the same—a defense to the claim of the plaintiff.

We have previously pointed out, page 19 Appellees' Brief, that the defense of the Statute of Frauds is not available to the Appellant. We wish to cite an additional authority, namely:

Clarke vs. Philomath College et al, 99 Ore. 366,
195 Pac. 822

where it was stated:

"The defense of the statute of frauds is personal, and cannot be interposed by strangers to the agreement. It can only be relied upon by the parties to the contract or their representatives or privies. Like many other defenses, such as usury and infancy, it might be waived. 29 Am. & Eng. Enc. of Law, 807."

If Counsel for Appellant is going to quibble over the word "defense," we wish now to contend that the Statute of Frauds is not available to the Appellant either as a defense or as a means of relying on a supposed weakness in the Appellees' position. If Appellant relies on the Oregon Statute of Frauds (Section 2-907 O. C. L. A.) in any manner whatsoever, it is required to set it

forth affirmatively in its answer, under the Federal Rules of Civil Procedure. Rule 8(c) provides in part:

“In pleading to a preceding pleading, a party shall set forth affirmatively * * * Statute of Frauds * * * and any other matter constituting an avoidance or affirmative defense * * *.”

CONCLUSION

In concluding we wish to comment again on the fact that the principal point of controversy is the insurable interest of the Appellees. We have previously contended that sole and exclusive ownership is not necessary to establish an insurable interest. The trial court has now held that ownership of the dredge was complete in the Appellees. In view of the language found on page 16 of the Appellant's Brief on the Supplemental Findings of Fact we deem it necessary to once again call to this Court's attention the fact that insurable interest does not depend on ownership as such. The truth is that insurable interest may be based on anything short of sole and exclusive ownership as long as the insured will derive pecuniary benefit from the preservation of the insured property or will suffer pecuniary loss or damage from its destruction, termination or injury by the happening of the event insured against.

44 C. J. Section 175

Washington Fire Relief Assn. vs. Albro et al,
137 Wash. 31, 241 Pac. 356.

In *Washington Fire Relief Assn. vs. Albro et al*, supra, The Supreme Court of Washington said:

“It is a rule of law, founded on sound public policy, that one person cannot insure for his own benefit the property of another in which he has no interest. But the husband in this instance was not without the interest. The contents of the barn, at least the hay therein, was the product of the joint labor of both the husband and wife, and was their community property. In this plainly the husband had an interest and could lawfully insure it in his own name for their joint benefit. So, also, we think, he had an insurable interest in the barn, notwithstanding it may have been legally the separate property of his wife. As is shown by the cases collected in 20 C. J. 20, under section 3, the term ‘interest,’ as used in the phrase ‘insurable interest,’ is not limited to property or ownership in the subject-matter of the insurance; that where the interest of the insured in, or his relation to, the property is such that he will be benefited by its continued existence, or will suffer a direct pecuniary loss by its destruction, his contract of insurance will be upheld, although he has no legal or equitable title.”

Accordingly, even though this Court should decide that the finding of the trial court of ownership by the Appellees was in error, nevertheless the evidence definitely shows that they had an insurable interest in the dredge, tested by the rule above announced. In this connection we cite these additional authorities:

Couch Cyclopedia on Insurance, Vol. I, Section 292.4.

Cooley's Briefs on Insurance, Vol. I, pages 207, 212, 217, 224 and 308.

At the present state of these proceedings, the matter before this Court is a consideration of the propriety of

the findings of the trial court filed with the Circuit Court of Appeals on or about June 24, 1948. We believe there is no responsible evidence at variance with the findings entered by the trial court at that time. Accordingly, we urge that the findings as made and entered and now on file in this court, be upheld.

Respectfully submitted,

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W. K. PHILLIPS,

WM. C. RALSTON,

Attorneys for Appellees.

In the United States
COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a
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Appellant,

vs.

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FRANCIS M. STEINBACH, and CARO-
LYN S. STEINBACH,

Appellees.

PETITION FOR REHEARING
AND BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

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Portland 4, Oregon,
Attorney for Appellant.

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PAUL P. O'BRIEN,

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LYN S. STEINBACH,

Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States for the District of Oregon.

Comes the Appellant and respectfully petitions the
above entitled court for a rehearing of the above entitled
case upon the grounds hereinafter in this petition set
forth.

1. This court has held that Captain Corgan held the
legal title to the dredge and that the Steinbach ladies
held a beneficial interest therein. Such a theory was
not alleged in the pleadings and did not become an issue

at the trial below or in this court. Appellees never argued this theory in the court below or in this court, nor is it touched upon in any of the briefs. None of the authorities cited by this court in support of this theory were cited in any of the briefs. Appellant has never had an opportunity or occasion to argue or brief this theory and desires to do so.

2. This court is quite inconsistent in its discussion of such concepts as "legal title", "ownership", "beneficial interest", and the like. For example, in the first complete paragraph on page 3 of the opinion, the court commences by saying that Captain Corgan held the legal title and ends by saying that the Appellees held the legal title. By the aid of this confusion the court has held for the purpose of getting an interest into the Appellees through the family conference, that the Appellees were the beneficial owners of the dredge, and for the purpose of making truthful the representation made by Mr. Steinbach to the insurance agent that the Appellees owned the dredge, that they were the legal owners.

3. This court has incorrectly set forth the Oregon Statute which, contrary to the paraphrase thereof in the opinion, provides that an equitable interest is an insurable interest only if the person holding the same stands to gain or lose by the safe arrival or loss of the property insured. There is no evidence that either of the Appellees lost anything when the dredge was lost or would have gained if it had not been lost. The uncontradicted evidence is to the contrary.

4. The court has utterly disregarded the testimony in saying that the defective hawser was a part of the equipment of the "tug".

The Appellant attaches hereto its brief in support of this Petition and requests the court to examine this brief in considering this Petition.

Respectfully submitted,

MACCORMAC SNOW,

Attorney for Appellant.

I, MacCormac Snow, do hereby certify that I am counsel for the Appellant above named and that in my judgment the foregoing Petition for Rehearing and the brief submitted in support of the same are well founded and that the said petition is not interposed for delay.

MACCORMAC SNOW.

In the United States
COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a
corporation,

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CARO-
LYN S. STEINBACH,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

In Support of Its Petition for Rehearing

We will take up the four points set out in the petition for rehearing in the order in which they are there stated.

This Court's Theory New and Untested

1. Taking up the opinion by its four corners, we think the Court intended to hold that Captain Corgan took the legal title to the dredge under a trust, with the

beneficial interest in the Steinbach men, and that the men in the family conference transferred this beneficial interest to the ladies.

This view of the case is entirely outside the issues heretofore made. The Complaint alleges and the Answer denies that the ladies were the owners of the dredge. There is no allegation of any trust or of any separation of legal and equitable rights. The case was tried on the theory that the ladies claimed to be the legal owners, although when all the evidence was in it showed without dispute that they never acquired the legal title. However, the Trial Court wanted the Steinbach men to have the proceeds of the insurance policy, so he held at first the women were the "proper parties" to insure the dredge. Your Honors considered this a conclusion of law and sent the case back for supplementary findings. The Trial Court then held without benefit of evidence that the ladies were the legal owners of the dredge. Your Honors must have been dissatisfied with the trial Court's second effort because you held that Captain Corgan held the legal title in trust for the ladies.

There has been no occasion up to this time for either party to brief either in the Trial Court or in this Court any question of beneficial or equitable ownership and neither party did so. Your Honors have sprung a brand new theory and have condemned the Appellant under this theory without giving the Appellant a chance to make any defense.

If the Appellees had pleaded that they were the beneficial or equitable owners of the dredge, the answer

would have been different and the issues would have been different on the trial. The Appellant would have placed greater emphasis on the fact that the policy purports to insure legal ownership not beneficial interest. Appellant would also have pleaded and relied more strongly on the misrepresentation by which John L. Steinbach represented that the ladies owned the legal interest and said nothing about a beneficial interest. Additional evidence would have strengthened the record on this point in favor of the Appellant. On the legal side of the issues, Appellant would have briefed thoroughly the English cases and the American cases which hold that ordinarily legal and not beneficial interests are the subject of insurance and that where beneficial interests are insured they must be especially declared and described to the underwriter. On this latter point Appellant has already cited one case that of *Ohl v. Eagle Insurance Co.* (CCD Mass.) 18 F. Cas. # 10473, an opinion by Mr. Justice Story of the Supreme Court of the United States an excerpt of which we insert at this point.

Ohl v. Eagle Ins. Co. (CCD Mass.) 18 F. Cas. # 10473, reiterating 18 F. Cas. # 10472.

The insured vessel's written record showed ownership by Ohl and Remington. The vessel was lost. Ohl attempted to recover the full amount of the policy but was permitted to recover only one-half. Ohl claimed a beneficial interest in Remington's legal title to one-half, but Mr. Justice Story said concerning equitable interests:

“Whatever may be the general rule on this subject, in ordinary cases, I am of opinion, that an insurance on a ship is to be deemed, unless a special explanation is given, to be an insurance on the legal interest, and not on a mere equitable interest, as contradistinguished from the legal interest of the ship; and at all events not an insurance upon a mere private, verbal trust, in opposition to the ship’s papers and the overt acts of the parties. If such an interest is to be insured, it ought to be disclosed. The nature of such a title must ordinarily be material to the risk: and if by possibility it be not so, still it cannot be fairly presumed to be within the intention of the underwriter upon the common terms of a policy on a ship. In the absence of all explanation I think those terms must be understood to apply to a legal interest, and not to a mere parol trust or equity. I confess myself also to be strongly of opinion, that there is, in every case of this nature, an implied representation, that the ship’s papers are according to the real legal ownership. No one has a right to say, that the true character of the ship and the representation of the genuine interest of the parties to the insurance are not, or may not be, material to the underwriter in estimating his risk. No one has a right to suppose, that in case of loss the underwriter is to be responsible, not according to the legal import of the ship’s papers, but to verbal engagements and parol trusts, which are susceptible of being shaped according to events. In what manner could the underwriters in this very case, assert an exclusive ownership upon an abandonment against Remington? The effect of the acts of the master, being a part owner, might be very important in the consideration, not only of questions of peril and revenue, but of the general conduct of the voyage. If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose, that the parties deal with him upon the naked avowal of legal titles.”

Even with the present record we think that, if given a fair chance, we can demonstrate to this Court that the ladies never received a beneficial interest in the dredge or that even if they did they did not insure such an interest.

We submit that when an Appellate Court invents a new theory for the decision of a case, a theory that has not been argued by counsel or presented in the pleadings, that theory should, in all fairness be subjected to the criticism of counsel on both sides.

Another question we should like to argue,—a true beneficial interest is, under the law of trusts, always valuable. A legal title may be naked,—that is, without value inhering in the possessor thereof. The same cannot be said of a beneficial interest. The ladies put no value into the dredge nor did they receive any value from the men. John L. Steinbach said (Appellant's Main Brief, 20):

"I was interested in just the insurance being enough to cover, to protect us for the amount that we had paid for it. I thought we should insure it for not over \$10,000 and probably \$8,000. We were kind of short of money."

When he said this, Mr. Steinbach was talking about himself and his brother, not about the two ladies. There is no doubt that the women are not the real parties in interest in this case. Any recovery they make they will turn over to the men except to the extent that Captain Corgan may get a part.

Again we would like to cite authorities and make an

argument based on the Oregon Statute (O.C.L.A. 101-1119) which provides in part as follows:

“Every contract of marine insurance by way of gaming (gaming) or wagering is void.

“A contract of marine insurance is deemed to be a gaming or wagering contract (b) where the policy is made ‘interest or no interest’, or ‘without further proof of interest than the policy itself’, or ‘*without benefit of salvage to the insurer*’, or subject to any other like term; provided, that where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.” (Emphasis ours)

This is not an insurance where there is no possibility of salvage. In fact, a suit is now pending against Otto Berg and his son, owners of the fishboat Julia D. for the negligent loss of the dredge.

But what chance does the insurance company to have to realize on this salvage in view of the fact that the legal title to the dredge is now held to have been in Captain Corgan and the women lost nothing when the dredge was lost. What salvage is possible where a beneficial interest is insured? The insured cannot in such a case give title to the property if there is any salvage left in it nor can the assured give the company a good cause of action against a wrongdoer causing the loss of the property. If the insurance company had voluntarily taken upon itself the protection of a beneficial interest that would have been another matter, but Mr. Steinbach testified that he told the insurance agent that the ladies owned the dredge and this testimony was repeated by Mr. Knapp, the insurance agent, and stands undenied.

We touched on these matters of salvage under the contention made by the Appellees when this case first went before your Honors that the ladies owned the dredge because they owned it in common with their husbands. But when subject of salvage is looked at from the point of view that the ladies had a beneficial interest in the dredge, that subject takes on a new aspect.

We think the Court before committing itself to the beneficial interest theory should hear argument on this point and permit it to be briefed.

The Court's Trust Ideas Are All Confusion

2. The Court cites two trust cases in order to demonstrate that the Appellees were the beneficiaries of a trust in the dredge, the legal title to which was in Captain Corgan. Neither of these cases was cited by either party in any brief. Neither remotely suggests any similarity with the facts at bar. But both opinions are well considered upon their own facts.

In the case of *Allen v. Hendricks*, 104 Ore. 202, a father was the owner of two certificates of deposit. He indorsed them in blank and sent them to his son with a letter written and signed by him. He thereafter died. The case turned on the meaning of the letter. The father's executor claimed that it created a bailment in the son and that the estate was the owner. The Court held, however, that the effect of the letter was to place the legal title to the certificates in the son, in trust nevertheless for the father during his lifetime, with a

remainder over to the son, and that this remainder, upon the death of the father, ripened into ownership.

The opinion was written by Honorable Lawrence T. Harris, one of Oregon's most distinguished jurists. Judge Harris thought proper to go into some of the fundamental concepts of the law of trusts. He said (223):

"A trust implies two estates,—one legal, and the other equitable; it also implies that the legal title is held by one person, the trustee, while another person, the *cestui que trust*, has the beneficial interest. (223)"

The Court also cites Professor Austin W. Scott's great work on Trusts. Mr. Scott says what Mr. Justice Harris does, in language only slightly different (1 Scott 36):

"A trust is created only where the title to property is held by one person for the benefit of another."

It is interesting and surprising to us that the Court, in passing on the present case, should have found and cited an opinion by Mr. Justice Harris. The Judge is both a plain man and a learned lawyer; he uses words in their well understood meanings, and with precision. He says at page 211:

"The owner of personal property can, when dealing with it, create a trust. . . ."

In using the word "owner", Judge Harris obviously did *not* mean to describe the beneficiary of a trust already created, in which the legal title was in some trustee. He used the word in the sense that Americans use

it millions upon millions of times each day. When we say that Smith owns a horse or that the Steinbach ladies own a dredge the hearer understands that ordinary legal ownership is meant, not that Smith or the Steinbach ladies have a beneficial interest only in the horse or the dredge, and that the legal title is in some one else.

The word "owners" is used in its ordinary sense in the policy of insurance at bar (Tr. 64), and also in the complaint where it is alleged (denied by the answer) that appellees were the owners of the dredge (Tr. 2). Likewise the Trial Court used the word "ownership" in its commonly accepted meaning in his Supplemental Findings, wherein he says that the ownership of the dredge by the Appellees was complete.

The Court cites the Restatement of the Law of Trusts, another work of the very highest merit. The Restatement says of the term "Owner" that it signifies the holding of a title for one's own benefit alone. We quote (1 Restatement 9 # 2d):

"Title and Ownership. The term 'owner' is used in the Restatement of this Subject to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has 'title' to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term 'title', unlike 'ownership', is a colorless word; to say without more that a person has title to certain property does not indicate whether he holds such property for his own benefit or as trustee.

"Ownership may be predicated of a thing as well as of interests in the thing. A person is termed 'owner of a thing' if he has complete property in

the thing; and even if he has parted with some of his interests he may still be termed owner of the thing, for example, where he has granted an easement or made a lease. The phrase 'title to a thing' denotes an aggregate of interests in the thing of such an extent that if the person who has the title is not under a duty to deal with the interests for the benefit of another person, he is owner of the thing.

"Illustration:

"2. A, the owner of Blackacre, grants an easement over Blackacre to B and makes a lease of Blackacre for ten years to C. A transfers Blackacre subject to the easement and lease to D and his heirs upon an active trust for E. B has title to and owns an easement in Blackacre but has not title to and does not own Blackacre. C has title to and owns a leasehold estate in Blackacre but has not title to and does not own Blackacre. D has title to but does not own Blackacre. E has title to and owns an equitable interest in Blackacre but does not have title to and does not own Blackacre."

We wonder if this Court realizes how terribly it has misused such words as "title", "ownership", "owner" "beneficial interests", and their counterparts, and what havoc this misuse has played with the sense of the opinion. The opinion falls into three parts.

1. Your Honors hold that Captain Corgan took a transfer of the dredge from the War Department and did not execute any instrument transferring it to the Appellees or anyone else, and that Captain Corgan was the "holder of the legal title" (p. 3, line 9). We have no fault to find with this. It is clearly in accordance with the testimony.

2. Your Honors go on to say that at the family conference it was understood between the four Steinbachs that the "ladies should own the dredge" (p. 2, line 29); that the Steinbach men "later obtained an interest (p. 2, line 36); that this was "sufficient recognition to pass the beneficial interest to the wives" (p. 3, line 4).

This, we think, is loose thought, out of step with the evidence. The Court will remember the testimony about the family conference. Frances Steinbach said, "We were all to own it together" (Appellant's Brief on Supplemental Findings of Fact, 25). Carolyn Steinbach testified that she had no financial interest in the dredge, and no ownership except "just through my husband" Appellant's Brief on Supplemental Findings of Fact, 30). David Steinbach and John L. Steinbach testified substantially in the language of the former, "Well, we agreed to put it in the ladies' names" (Appellant's Main Brief, 22).

In this testimony there is *no suggestion whatever about separating the legal title from the beneficial interest*. All of the testimony was about ownership. The idea of a trust with the legal title in Captain Corgan and the beneficial interest in the ladies is the invention of the Court.

3. However, the gravest error of the opinion is that having satisfied yourselves that the women got a beneficial interest in the dredge, your Honors then, without reason, precedent, authority or testimony undertook to turn that beneficial interest into a legal title. We ask the court to reexamine its most amazing paragraph,—

the first complete paragraph on page three of the opinion. *This paragraph starts by treating Captain Corgan as holder of the legal title and ends saying that the legal title lies with the Appellees.*

Where could anybody find authority for the proposition that because a trustee who holds the legal title does not register objection to the supposed transfer of a beneficial interest from one beneficiary to another, the transferee beneficiary thereby becomes vested with the legal title and combines in himself full ownership,—that is, the beneficial interest merged with the legal title. Your Honors never found anything like this in Scott or the Restatement, or in the cases cited in the opinion.

The Court having transferred the beneficial interest from the men to the women without aid of testimony, and having then converted the women's beneficial interest to a full ownership by pure legerdemain, says that John L. Steinbach misrepresented nothing when he told the agent of the insurance company that the women owned the dredge and had bought it with their own money (Appellant's Main Brief, 17). "This must have been so," says the Court (p. 4, line 2) because the women held,—(of all things) "*the beneficial interest*".

Thus, at the end of the opinion, the Court overlooks the ladies' "legal title" and claims for them only a beneficial interest. Mr. Steinbach did not represent to the insurance agent that the women had only a beneficial interest in the dredge, he represented that they owned it. He so testified (Appellant's Main Brief, 18).

It should not be overlooked that the ladies paid no money or gave no value for the dredge, received no written transfer, took no delivery of the dredge, and never had possession or control of the same.

What does the Court mean by the terms "beneficial interests", "title", "legal title", "owned", and "ownership"? Certainly the Court does not mean the same thing for any of these terms each time the Court uses it.

We think this Court owes to itself the duty of re-writing this opinion so that the words in it mean the same thing every time they are used, so that the legal reasoning shall be well knit, and so that the entire opinion may conform to the testimony.

This Court Misstates the Oregon Statute and Ignores the Other Authorities

3. This is an insurance case involving insurable interest, yet this Court cites in its opinion no insurance case and, by the same token, no case involving insurable interest. The reason is not that there are no cases to cite. The briefs cite many of them, some directly in point,—all contrary to the opinion.

The only insurance law cited by the Court is the Oregon Statute (p. 3, line 21-23). If a lawyer in a brief were to misstate the purport of a Statute as the Court has in its opinion, it would be a sure sign that his case was weak, and that he knew it, and hoped the Court would not read the entire Statute. This Statute is correctly quoted on page 73 of Appellant's main brief. As

far as concerns this case, it is to the effect that a person has an insurable interest if he stands in a legal or equitable relation to insured property *in consequence of which* he may benefit by its safety or due arrival or be prejudiced by its loss.

The Court holds that the Appellees were beneficiaries of a trust in the dredge and therefore had an equitable interest in the dredge and therefore had an insurable interest therein. But in so doing the Court overlooks the equally important second half of the Statute. Let the Court point out how the Appellees would have gained by the safe arrival of the dredge or how they lost by the loss thereof. The Appellees did not have one dollar in the dredge. They would have gained nothing if the towage had been made safely and they lost nothing by the loss of the dredge.

Carolyn Steinbach testified that she had no financial interest in the dredge. Frances Steinbach loaned money on an unsecured note and will be repaid regardless of the loss of the dredge (Appellant's Main Brief, 13).

No Tug Was Involved—Hawser Is Not Fishboat Equipment

4. As regards the defective hawser, the Court has quite disregarded the evidence. The towage was not attempted by a tug but by a fishboat. The equipment of the fishboat did not include any hawser, (Tr. 150, 154) (why should it?) therefore Captain Corgan said he would borrow one. He and his son, without permis-

sion (Appellant's Main Brief, 59), got the hawser out of the loft of the Coast Guard boathouse and payed it out of the window to the deck of the fishboat below. It broke five times. Of course the fishboat and its owners were negligent in using the hawser. But the hawser was no part of their equipment. A fishboat does not need a hawser, it uses other equipment in its ordinary business.

We submit that the Court has not correctly rationalized the case and should require additional argument.

Respectfully submitted,

MACCORMAC SNOW,

Attorney for Appellant.

